UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 05-44481-rdd

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In the Matter of:

DPH HOLDINGS CORP., ET AL.,

Debtors.

- -x

United States Bankruptcy Court

300 Quarropas Street

White Plains, NY

October 24, 2011

10:20 AM

B E F O R E:

HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

Notice of Agenda Proposed Seventy-First Omnibus Hearing Agenda (Re: Doc #21674)

Notice of Agenda -- Notice of Agenda Proposed Forty-Ninth Claims Hearing Agenda (Re: Doc #21675)

Transcribed by: Dena Page

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P R O C E E D I N G S

THE CLERK: All rise.

THE COURT: Please be seated.

Okay, good morning. DPH Holdings.

MR. BUTLER: Your Honor, good morning. Jack Butler, Al Hogan, and Louis Chiappetta from Skadden. Bruce Sendek, Cynthia Haffey, Sheldon Klein, Thomas Radom, and David Devine from the Butzel law firm, and Richard Milin from the Togut law firm, all here on behalf of DPH holdings for its forty-ninth claims hearing and its seventy-first omnibus hearing.

Your Honor, with the Court's permission, given the nature of the matters before the Court today, we'd like to proceed with the claims hearing first. We think we can dispose of that quickly.

THE COURT: That's fine.

MR. BUTLER: Your Honor, there is only -- when looking at the forty-ninth claims hearing, there is one matter that's been adjourned, matter number 1, the Calsonic Kansei matter has settled in principle but has been adjourned to the November 17th hearing pursuant to a notice of adjournment we filed at docket number 21573.

THE COURT: Okay.

MR. BUTLER: There are three matters, Your Honor, before the Court. The first is the -- matter number 2 is the Select Industries Corporation matter. This has been resolved

by a joint stipulation that's been submitted to the Court, and Your Honor entered it at docket number 21661 which resolves matter number 2.

Matter number 3 is the Vanguard Distributors matter. This was at docket number 19873. That matter has been settled in principle. The reorganized debtors have submitted a stipulation to chambers reflecting that settlement; it's not yet been docketed.

THE COURT: Okay.

MR. BUTLER: And matter number 4, Your Honor, is the one matter we're proceeding with. It's not contested, and it was our claims objection regarding the claim of STMicroelectronics, Inc. at docket number 19356. We noticed this claim for hearing at docket number 21591, and we filed our supplemental reply at docket number 21646. According to the response from STMicroelectronics, which was docketed at 19403, there was the amount of 15,275 that remained owing in connection with the proof administrative claim. That claim was claim number 18969. As we've indicated in our papers, and as reflected in the books and records of the company, all of these amounts were paid by five separate checks in 2009, totaling in the aggregate -- excuse me, in 2011, the last check being paid on September 15th of 2011 -- in the aggregate amount of 15,275. STMicroelectronics chose not to file a supplemental response in connection with the check numbers and dates and so on we

provided in our Exhibit A and Exhibit B of our supplemental reply. I don't think there's anything, Your Honor, here at controversy. We'd ask Your Honor, therefore, to enter an order disallowing the proof of administrative expense claim number 18969 in its entirety.

THE COURT: Okay, in light of the supplemental reply, including the exhibits, and there being no opposition to that or appearance today by the claimant, I'll enter the order disallowing the administrative claim.

MR. BUTLER: Thank you, Your Honor.

Your Honor, that concludes the forty-ninth claims hearing.

THE COURT: Okay.

MR. BUTLER: Your Honor, we now move to the seventy-first omnibus hearing, and there is an agenda here that lists a total of eight matters. My understanding, Your Honor, based on discussions with chambers and preparing the agenda that matter number 6, the reorganized debtors' third case closing motion, which is contested, will be dealt with last on the calendar today.

So moving to the other matters, let me begin with the adjourned matters. First, the reorganized debtors' motion to enforce a judgment against nonparty Charles Tebele. That matter's been adjourned to the November 17th hearing by agreement of the parties.

Your Honor, that's also true with matter number 2, the motion by reorganized debtors to enforce plan injunction against Oldco trustee at docket number 21556. The parties have agreed to continue that matter until November 17th, as well.

A word, Your Honor, about matter number 3. This is the motion by the reorganized debtors to approve a settlement with the United States at docket number 21605. This matter has been adjourned in discussions with the United States, with the Department of Justice, to the November 17th hearing. As we indicated to the Court in our papers, the United States published notice of the proposed settlement in the federal register on October 7th of this year, and the public comments period expired last Friday, on October 21st. The United States has advised us that upon conclusion of the comment period, they intend to file with this Court any comments received, although we understand none were, as well as their responses and view in connection with the pleading in support of the relief sought in the motion. The United States has indicated they need the time to the next hearing to take the actions they need to take on behalf of the government, and we expect them to file their pleadings, Your Honor, and be before you on that motion next month.

THE COURT: Okay.

MR. BUTLER: The fourth matter, Your Honor, to be adjourned is a letter by James Grai, G-R-A-I, to lift the stay.

It's been docketed number 21574, and we have treated it as a motion to lift the stay. It has been -- and we filed, as coordinated with chambers, a response to the letter at docket number 21652, which is treated as an objection to that motion. And by agreement of the parties, that -- I should also tell you, in the interim, Mr. Grai is now represented by counsel. His counsel filed a joinder in connection with that to be heard at the November 17th hearing. And so there's been a lot of other documents filed. There's also been documents filed by the Michigan defendants and some other papers. But the long and the short of it is his counsel has agreed with the reorganized company to adjourn this matter to November 17th and have it heard on that hearing date.

THE COURT: Okay, was this the letter where the former employee said that the State of Michigan wasn't making payments out of its own funds because of the stay?

MR. BUTLER: Yes, Your Honor. That's the letter. We don't believe -- the reorganized debtors don't believe that there's anything in either the modified plan, Your Honor's prior orders, or applicable bankruptcy law that prohibits the fund from paying workers' compensation benefits. We understand that it is the position, at least at the moment, of the Michigan defendants, that because of the funds administration is currently involved in appeal of this Court's ruling on issues of lack of jurisdiction and sovereign immunity, that the

funds administration has determined it doesn't intend to make payments until that matter is resolved.

THE COURT: It's not really a stay issue, then?

MR. BUTLER: No, it's not, Your Honor.

THE COURT: Okay, it just seemed to me that someone should focus on it and perhaps -- well, now that he has a lawyer, I think that's helpful.

MR. BUTLER: Right, and we have advised him, Your Honor, of that matter, but I mean, and -- from the -- again, from the reorganized debtors point of view, there's nothing that this Court has entered and there's nothing that the company has sought in any of its plan documents or any order that we've procured from this Court that would prohibit the funds administration from making these payments.

THE COURT: Okay. So that leaves Mr. Sumpter?

MR. BUTLER: Matter number -- no, that's part of -- the only thing we have left -- that's part of number 6. That's the, Your Honor, the third case closing motion. We indicated we're, I believe in connection with chambers, it was going to be taken at the end of the case.

THE COURT: Well --

MR. BUTLER: Unless you want to deal with it now, whatever you want to --

THE COURT: Mr. Sumpter, are you on the phone?

MR. SUMPTER: Yes, I am.

THE COURT: Okay, I think it's a fairly simple motion. I think it's probably worthwhile to do it now rather than --

MR. BUTLER: Let me -- yeah.

THE COURT: -- keep you all waiting.

MR. BUTLER: Mr. Radom's going to handle that, Your Honor.

THE COURT: That's fine.

MR. RADOM: Good morning, Your Honor. Tom Radom from the firm of Butzel Long. This is the third case -- third motion to close certain debtor cases, and in this case, there's five cases that we're requesting they be closed. They're fully administered. We have had conversations with the U.S. Trustee's office in regard to the closing of these five cases. I won't go through the motion itself; I'll assume you've read it.

We've had one objection by Mr. Sumpter. And as we've indicated in our reply to Mr. Sumpter, again, it's one of these pleadings where we're not sure exactly what he's saying or whether he's provided a legitimate reason for filing the objection in the first place, but reading it, I think what he's saying here is don't close these cases because I'm going to take an appeal, and if I succeed on my appeal, then somehow, maybe I have rights against these five debtors, or alternatively, that the closing of these cases could impair my appellate rights, and we've indicated in our reply that that

just isn't the case.

THE COURT: Okay, and as part of that, you've pointed out that none of these five debtors was an employer of Mr. Sumpter's, and secondly, that none of them is the administrator of any --

MR. RADOM: Salaried retiree benefits, that's correct, Your Honor.

THE COURT: -- any benefit plan.

MR. RADOM: That's correct.

THE COURT: So it appears to me, Mr. Sumpter, that there's a legitimate reason to close these cases and that they couldn't possibly affect -- and that that order couldn't possibly affect your appeal.

MR. SUMPTER: Well, my one concern was, in my appeal, I was going to ask the district court to consider the issue whether or not my motion could represent the interest of all salaried retirees. And so, you know, we don't -- I didn't have the option -- opportunity to get discovery, but the assumption was that there are salaried retirees from those five companies.

THE COURT: All right.

MR. SUMPTER: And so if I did prevail, that's where the issue would be. And that's why I was concerned about the cases being closed, because according to the motion written by Ms. Haffey, all the -- it assumed that all contested matters were resolved.

THE COURT: Well, I do not believe that the closing of these five cases prejudices your appeal.

MR. SUMPTER: Okay.

THE COURT: And if for some reason, the closing of the cases does that -- but I don't believe it would -- you could always petition to reopen them.

MR. SUMPTER: Okay.

THE COURT: Okay?

MR. SUMPTER: That's fine with me. Thank you very much.

THE COURT: All right, so I grant the motion.

MR. RADOM: Thank you, Your Honor.

MR. BUTLER: Your Honor, we now move to matter 5 on the agenda which is the reorganized debtors' motion to file statement regarding service of the final form extension motion, docket number 21509.

Just a word, Your Honor, about the procedural posture of these cases in this regard and with respect to this hearing. The substantive motion which is before the Court is listed at matter number 7, and it's a motion that applies across a series of separate adversary cases, and that is the debtors', DPH Holdings' first motion to amend or seeking leave to amend was filed back on September 7th of 2010 at docket number 20575, and it was filed in connection with 132 of the 177 actions that were retained under the plan of reorganization that the debtors

sought to be confirmed as modified by this Court, which occurred in July of 2009 and which went effective in October of 2009. Of those 132 cases, 68 of them remain open today, and of those 68, there are 10 that are on hold but are not particularly active because no defendant has yet been able to be located or active; there's about 21 million dollars worth of preference actions sort of staying on the outside that may ultimately come before Your Honor in the form of default judgments or other activity, but they're on the side.

There are fifty-eight active cases. Of those fifty-eight active cases, the aggregate avoidance amounts for the ninety-day period are 254 million dollars. And of those fifty-eight active cases, there are thirty-seven parties that oppose the motion. That is, thirty-seven parties that oppose DPH's first motion for leave to amend. And those thirty-seven parties represent 204,112,570 dollars worth of alleged transfers during the ninety-day period. Now, I was advised by Ms. Haffey, as we were getting ready to begin the hearing today, that one of those defendants has settled, and that will come to Your Honor subsequently. That would reduce the thirty-seven to thirty-six and the amount in controversy, from a preference perspective down to 192 million dollars.

So as we sit here procedurally, there is a first request for leave to amend, there are thirty-six defendants who are opposing that motion to defend, and they are the subjects

of at least what DPH Holdings alleges to be 192 million dollars worth of transfers during the ninety-day period.

In connection with that motion, on October 22nd of last year, October 22nd, 2010, Your Honor entered a scheduling order that covered all of the cases in which Your Honor indicated that the Court would hold particularized hearings with each defendant in each case at an appropriate time as set by Your Honor's scheduling order to determine how to proceed with that particular case. Since that time, there've been a series of omnibus hearings covering issues that were alleged to transcend all of the cases, the most recent of which occurred on June 21st, at the June 21st hearing. And Your Honor asked that in connection with this hearing, that notice matters raised on that record at a transcript that's been docketed docket number 21490 be addressed by the reorganized debtors and the defendants. And Your Honor invited defendants to file declarations in connection with those matters relating to, among other things, the service of the final 4(m) extension motion which was docket number 18952 and which was approved by Your Honor October 22nd, 2009. And so in connection with this hearing, at least the reorganized company's understanding is that all the matters listed under number 7, except the limited notice matter that Your Honor has focused on for this hearing that Your Honor dealt with at the June 21st hearing, the remainder of these matters of which there a voluminous number

of filings from these thirty-six defendants, that those matters and, for that matter, the substance of the company's motion for leave to amend, that those matters would be adjourned to a later date to be set by Your Honor after this hearing is completed.

And so where we are, Your Honor, is here to address the notice issues that Your Honor directed be reviewed and responded to and answer any questions that the Court has in connection with those. And it was in response to that direction on the record at the June 21st hearing that the reorganized debtors prepared a statement regarding the form extension motions and asked for leave to file that, and that matter is at docket number 21509. That statement was prepared by our law firm, by Skadden, Arps, in connection with the reorganized company because it covered time periods and motions where we represented the debtors and we were before the Court.

And Your Honor, it also -- there is pending, today, as to that motion, I believe only three objections to our leave -- to the reorganized company's motion for leave to file that statement, the most substantive of which are -- two of them are just objections that relate to sort of general relief. The third, which is substantive, that was filed is an objection to that motion as filed by Methode, and they have -- one objection was filed by Heraeus, and there was a joinder filed by Unifrax; those were blanket objections to all relief sought by the

reorganized debtors in connection with the adversary proceedings. Those two objections didn't raise, at least in their papers, any argument as to why the reorganized debtors should not be permitted to file the statement, and we believe are more appropriately dealt with in connection with the motion to leave when it's addressed ultimately by the Court.

The objection filed by Methode raises arguments as to why the reorganized debtors shouldn't be permitted to file the statement. Your Honor, the statement, which I'm not going to summarize because it details the procedural history here, there are, I think, with Your Honor's permission, just sort of four or five, six points, very briefly, I'd like to make in connection with it.

First, that the 4(m) motions, from their inception, were dealt with as ex parte motions by the debtors. That is what the case law anticipates that it was the notice and design of them, and it was our view at the time and remains our view that the case management order, which was a procedural order, did not require particularized service of that, and in fact, we had a series of discussions on the record at various of those hearings in which there was extended colloquy between the Court and, frankly, myself representing the debtors, as to who is being served and under what bases they were being served. And that dates all the way back to March 19th of 2008, and in each of the subsequent hearings, we discussed who would be served

and who wasn't served, and we've indicated in the statement and made reference to and attached the hearing transcripts and the references because, in fact, we had never intended and we did not give, and the reorganized companies do not assert that they gave particularized notice of the 4(m) motions to the defendants, which were the subject of sealed actions at the time.

The only deviation to that was in connection with the first extension hearing back in March of 2008. In the colloquy we had on the record there, Your Honor directed us to serve preference defendants, and we did so. And those, in fact, ironically enough, are the subject of one of the motions -- separate motions on today's agenda, matter number 8. And we did that on each of the hearings, the first extension -- the original preservation of estate claims hearing, and then the extension hearings that occurred in April of 2008 and again in October of 2009.

The next point, Your Honor, I'd like to make in connection with this is that there was at least a suggestion in the June 21st record that somehow the reorganized debtors and their counsel either misrepresented or mislead the Court in connection with the notices and the method of notice that was applied here, and I wanted to make a point of standing here before Your Honor and asking any questions Your Honor has in connection with that because at least we don't believe that was

ever the case. We think the record is clear, and we, frankly, think the orders are crystal clear on this matter because both the preservation of claims order and each of the extension orders, the first, the second, and the final, specifically provide that the service on the defendants in each adversary proceeding of the order relating to the 4(m) motions was to occur either when the debtors served a summons and complaint on the defendant or soon thereafter as practicable. And so there was a process that was set up in terms of how we were going about giving that notice. And the reason for that, of course, is under Rule 4 and under the case law, and frankly, as we stand here today, all the due process rights of all the parties, the reorganized company vis-a-vis the couple hundred million dollars in dispute, the thirty-six parties that are objecting here today, all those rights are preserved. And at least from the company's perspective, other than answering questions Your Honor has and making sure the record, here, is crystal clear, the company's view -- and Mr. Sendek will speak later on behalf of the Butzel firm and of the matters that are before the Court that they're handling -- but the view is that, from the reorganized company is that each of the defendants and the company should be able, under the scheduling order Your Honor entered in October of last year, as supplemented by some procedures orders that Mr. Sendek's going to talk to you about, ought to be able to have -- those thirty-six parties ought to

be able to have their day in court in their individual adversary proceedings to allege anything they want to allege in connection with the Rule 15 motion that's pending before Your Honor, and Your Honor has the discretion to make whatever judgment Your Honor believes is appropriate in those particularized circumstances. And therefore, everyone's rights are, as I indicated, preserved, and to the extent there's prejudice and Your Honor finds that prejudice weighs one way or another, Your Honor is able to sort those out on a case-by-case basis.

So Your Honor, I mean, that's really the substance of the statement we filed. We're not asking for any relief today from Your Honor other than as it relates to matter number 5, to grant the motion to have that statement made as part of the record.

THE COURT: What is DPH's response to Methode's objection?

MR. BUTLER: Well, Methode makes a couple of objections, Your Honor. They argue that the statement amplifies the fact that the reorganized debtors have not complied with the case management order. I don't know there's a response to that; I think they're wrong, in terms of what we've done, and we've laid it out as to what our views were, and it's very transparent during the course of the case as to how we were dealing with 4(m) motions in connection with the

case management order.

They asked that any additions provided by the -- their second argument is any additions provided by the statement would be irrelevant, and I think, Your Honor, in reviewing the June 21st transcript which went all over -- it was a lengthy and involved hearing, and lots of things were said, some of which were inaccurate about what occurred in connection with notice, even the facts, that the reorganized company ought to be able to file a factual statement that simply, as this statement does, lays out in a clear and concise way so the record is clear and concise about what occurred in connection with the 4(m) motions.

Their third argument is the cases have proceeded for over a year without the record being supplemented, and to supplement it now would be inequitable. Your Honor, I don't see how that's actually relevant here at all. The fact is the debtors, DPH Holdings, the reorganized companies filed a motion to amend back in September 7th of 2010; it's October of 2011. That motion is still pending, and in connection with that motion, there's been a series of hearings, the last one of which had a lengthy discourse and a lot of allegations made about notice. That was in June, and shortly thereafter, the reorganized companies, following Your Honor's directive in June, filed a motion to supplement the record and to provide information. So I don't know how it's viewed as not relevant

or untimely or inequitable when, in fact, it arises, in at least the reorganized company's business judgment, it arises directly from the June 21st hearing.

THE COURT: Okay.

MR. BUTLER: And then finally, they said the rationale underlying the final extension motion changed from that asserted in the prior extension motions. And maybe just a word about that, Your Honor, since the Court asked, we said in the statement, and I stand before Your Honor today and say that the basic, if you will, the umbrella rationale, the basic rationale for the extension motion at all these times continue to be relevant. The facts and circumstances changed from one extension motion to the other. Having lived this life, I know it personally.

The first several times we came to Your Honor, we came to you at a time when we thought we were operating under a settlement with our creditors that was going to lead to a plan investor, seven billion dollars' worth of financing, dividends approaching a hundred percent to creditors and one path, and it was on that basis that we approached the Court and dealt with those issues, still believing that we needed time to evaluate things and time to sort them through, but the facts were there.

The second time we came before the Court, in terms of the second extension motion, things had changed dramatically in terms of underlying facts, but the same basic rationale, that

we needed more time because of where we were at that moment in the case, was necessary, and that we established cause under 4(m). And 4(m) has -- we've gone far afield in this case, but 4(m) is reasonably precise about what you can seek and what -- and gives the Court wide latitude in terms of deciding whether cause is established, and that was in the case of heading to a place where we were unable to repay a DIP loan of 4.7 billion dollars and had to figure out how to get out of the case and it turned out -- and dramatically changed, through a plan modification, our approach.

And those, I should point out, I think it's relevant here, all those motions and all of the work done in connection with 4(m) and these adversary proceedings was subsumed within the plan modification order. These were all dealt with in the plan of reorganization. They were all specifically addressed in the plan modification order. Your Honor made very specific findings in the plan modification order. And the time to attack that order has long expired under any theory that anyone can promulgate. That period is gone.

And so at most, people can argue about the final extension motion. That one was filed after the plan modification order and after the company emerged, in the same month the company emerged from Chapter 11. And we came to the Court and talked about seven basic facts and circumstances and issues that occurred. The same umbrella, same basic rationale.

We said in the final extension motion at pages 17 and 18 of that -- or, paragraphs 17 and 18 of that motion that the complex nature of the transactions set forth in what was the modified plan, the master disposition agreement were causing the company in need to focus on them.

We told the Court, basis number two, that the fact that a significant amount of time and resources would be devoted to supporting the transition operations among DPH Holdings, GM components, and DIP Holdco III was diverting the company's time and attention; we needed more time to evaluate the actions.

The third thing we told the Court was the factors -- the debtors do not believe that DPH Holdings will be able to evaluate each of the retained proceedings within thirty days after the effective date; this came on in that thirty-day period, October 22nd. Thirty days after the effective date would have been November 4th, 2009.

And the fourth we said in the papers was the debtors may ultimately determine not to prosecute certain of the adversary proceedings.

That was supplemented at the October 22nd hearing in exchanges with the Court; we said three more things, all related to the same general need for an extension of time. One was that the intense period that led to the closing, it wasn't possible for the debtors to sort through the adversary

proceedings any further. I think the phrase used was "winnow down".

We told the Court that there was only one employee of DPH Holdings going forward, and he expressed the need to have more time to evaluate the proceedings.

And third, we informed the Court what we understood at that point, for the first time, which was a different law firm would be taking over the proceedings.

Now, just to be clear, going back to October 2009, Skadden only dealt with a very small number of those proceedings. The Togut law firm, Mr. Milin's law firm, handled the majority of those, and the company chose to bring in the Butzel firm to deal with the majority of those. Mr. Milin's continued to act as conflicts counsel. We're not handling any of them as relates to that. And that transition was another basis for time.

Now again, Your Honor, changed facts and circumstances, but all expressing a need for additional time. And the fact of the matter is that as we sit here today, the 177 that were retained are down to 68, and of the 68, there's 36 here complaining. About twenty percent of the retained actions are trying -- and I get why, I understand it. They've got 192 million dollars worth of transfers. So I understand the economic motivation.

But I think it's very important for the record to be

crystal clear that the due process rights of people under the case law and in fact are completely preserved, and they were completely preserved by Your Honor's October 2010 scheduling order. It seemed to me, at that point a bystander, now back here because some of our actions have been called into question, it seemed to us when we had reviewed those orders at the time that the Court got it. The Court understood that there needed to be, in connection with the motion for leave to amend, individualized hearings in each of the cases where each party could have their right to say whatever they wanted to say. That had to be balanced as Rule 15 requires; it had to be balanced by the Court against the broad public policy, and frankly, the case law that says that motions for leave to amend, certainly in the first instance, are generally widely granted. But there are certainly circumstances where Your Honor can conclude not here, not this time, not for this reason. And that's the discretion of this Court. And Your Honor has that discretion. And that discretion can be exercised under your own scheduling order. I think Mr. Sendek's going to talk to you about the view that from the company's perspective that not only ought nothing be done here, today, and the company's certainly not seeking to seek approval of the motion for leave to amend here, but rather, setting up a procedures order that you would consider next month to implement your October 2010 scheduling order so people can get

about the business of having, as to these remaining thirty-six, the last twenty percent, if you will, to have individual hearings where they can present whatever they want, and also perhaps including an ADR element of it, and hopefully those can get resolved, as well.

But there is a process, here, where everyone's rights are preserved, and it's not a backward attempt by some of these parties to try to essentially amend or revoke the plan modification order, as some folks try to delve back into this process pre-October of 2009, and it's certainly not, Your Honor, in the company's view, with respect to the final extension motion that was granted in October of 2009, pursuant to which these parties were served within 180 days. And unlike most of the cases that have been cited in all these things, there has been no substantive action taken by the Court. There's been no motion for summary judgment, there's been no action taken, there's been no decision taken by the Court that has made a determination here of any kind, as to these thirty-six defendants.

So Your Honor, we simply wanted to make clear in what had become, at least in the reorganized company's view, a less-than-clear record, we wanted to make clear what the facts are. And to the extent that particularly because these defendants, by the reorganized company's own admission -- and I should point out, there is a broad range of actual notice. When you

get to the particularized hearings and any of those defendants, there is a wide scope of notice that people actually had, which Your Honor, from at least our perspective is not really before -- ought not be the focus of today's inquiry. But by the company's own admission, we did not give particularized notice under the case management order to 4(m) defendants. We told the Court that, we spelled it out in the orders, in terms of when things were going to be served. And I simply, Your Honor, as the company's lead counsel at the time, if there were issues that the Court had with that or had with our representations, I wanted to be here before you to answer them.

THE COURT: Okay, all right. Well, as you noted, there were three objections to the debtors' motion to supplement the record.

MR. HERMAN: Your Honor, there were four.

THE COURT: Okay, there were four.

MR. HERMAN: Victory Packaging filed one on July 22; somehow, it was filed on the ECF --

THE COURT: All right.

MR. HERMAN: -- the debtor ignored it.

THE COURT: But I guess I read the objections as going to arguments as to whether the notice was proper or not, as opposed to the debtors' right to file a supplement. And I frankly welcome something on record saying what notice was given and the rationale for it, given that I raised the issue,

and I think other than Victory, I'm not sure anyone had. And it certainly sets forth the debtors' rationale as to this issue and puts in context the filings that were made by the various defendants who I asked to file something on it. So I'm not quite sure why the record shouldn't have this in it.

MR. BARRON: Your Honor, may I be heard?

THE COURT: Sure.

MR. BARRON: William Barron of Smith, Gambrell & Russell for the Heraeus defendants who are named in adversary proceedings 2442 AND 2445; we filed an objection. May I first make a comment on a couple of the opening statements regarding the agenda today? Because I think they dovetail with the question of the submission.

I note that the agenda that I saw this morning and the comment by Mr. Butler suggest that the entire motion for leave to file amended complaints is not part of the hearing today and is adjourned without date. That is not our understanding. Our understanding is that on June 21, the Court declared that there would be a part 2, in effect, to the motions for leave to file amended complaints, and that was all going to be part of what we do today and what Your Honor inquires and hopefully hears about today, and that point of clarification, from our perspective, would be very helpful.

Number 2, there are two groups, if you will, of defendants of the thirty-six, we now know. One group filed an

omnibus paper on October 7 giving them the self-designed moniker of the "no notice defendants". The fact is, none of the defendants received notice; none of the thirty-six of the third extension -- sorry, the fourth extension motion. The only thing that distinguishes the smaller group of the so-called no notice defendants is the fact that they received absolutely no notice, no constructive, no imputed, none of the other notice arguments that we have seen in the filings by the debtors. There were other defendants who -- and I don't know which ones; if it becomes relevant, it will develop -- where there are affidavits. They were either on ECF filing or they were mailed or received or somehow should have seen a copy of the disclosure statement or statements, and that those impacted on their receipt of actual notice sufficient to notify them that they had lawsuits against them and they should be defending themselves. Whether that be so, or not, we all submit that that's irrelevant. That, of course, would be for you to decide, but we think that could be decided on the current record.

We have the clear impression that the debtors want to put off as long as possible and put off over and over again a determination based on issues that have been fully briefed by all the parties, and yet we have another submission that comes in from Skadden, the so-called supplemental document that they asked the Court --

THE COURT: I asked everyone to submit information on this. Your client submitted affidavits. People submitted affidavits on this. And the debtors were supposed to respond to it; I directed them to.

MR. BARRON: Your Honor, if so -- if you're inclined, at your discretion, to accept that we have no basis on which to object to that, we're asking you to exercise your discretion not to.

THE COURT: But why? Why not?

MR. BARRON: Only because the view is enough is enough. But if we can have all these things on the table and on the agenda for today, that would be a welcome result for the defendants.

THE COURT: Okay. Well, I'm going to grant the debtors' motion to file their motion to supplement the record on the notice issue in connection with the Rule 15 motion. I think it's also applicable to the ultimate Rule 4(m) issues that are still before the Court but have been put on hold because we've been dealing with the amended complaint or the proposal to amend the complaint, just as I believe it's appropriate and directed the other parties to file their factual records as to notice. And so I'll overrule the objection on that point, which I viewed basically as commenting on the quality of notice and the legal arguments that are subsumed in first the Rule 15 motion and secondly, if and when

we get to it, the issues with regard to Rule 4(m) and on what basis should I view my prior orders. So the debtors can submit an order on that basis.

MR. BUTLER: Thank you, Your Honor.

THE COURT: Okay, now, the focus of this hearing is, in fact, on notice issues and/or assuming there's something more to be done in the cases, on the process thereafter. But I do want to circle back to the June 21 hearing, first, before we get to that. As you all who were here remember, and certain of you were not here then because you didn't have objections on on that basis, but there were several rulings by me on certain objections to the Rule 15 motion. Have they all been dealt with now? I mean, they were rulings on the -- they were issues, all basically going to the futility argument. There was the issue about amending -- making sure that the complaint reflected no double counting. There were Rule 8 issues; there were relation back issues. Have they all been dealt with at this point?

MS. HAFFEY: Your Honor, at that hearing, you -- this is Cynthia Haffey on behalf of the reorganized debtors -- asked the reorganized debtors to, to any of the defendants that requested a, what we call reconciliation of the relation back issue, to respond to those. We did do that timely and provided that to those defendants. And with the exception of one matter which now has been resolved, we did not receive any response

back from the defendants that they had any issue with the relation back --

THE COURT: Okay.

MS. HAFFEY: -- analysis that we did.

THE COURT: And so, just to make sure I'm closing the loop on this, I had communications from the Clarke Hill firm, and then you responded on that score. They were representing Doshi Prettl, I think.

MS. HAFFEY: That's correct, Your Honor.

THE COURT: That's the one that's been resolved?

MS. HAFFEY: That case has been resolved.

THE COURT: All right, so we really are just talking at this point, then, I guess, on the issue that I directed the parties to focus on which was the specific issues with respect to notice, right?

MS. HAFFEY: And if I could just -- and Mr. Sendek's going to deal more fully with this, Your Honor, but if I could just make one additional statement, Mr. Butler gave you statistics today of the remaining cases. I think it's also important to note that of those thirty-six remaining cases in which the defendants filed motions -- excuse me, filed oppositions to our motion to amend, of those, only thirty of those defendants actually did file an affidavit or declaration, so there would only be thirty before this Court. Thank you.

THE COURT: All right.

MR. SENDEK: Good morning, Your Honor. Bruce Sendek on behalf of the reorganized debtors. As Ms. Haffey just indicated, since we were last together on this matter in June, thirty affidavits have been filed in one form or another complaining that those defendants did not have notice of the final extension order.

The presentation you heard today from Mr. Butler regarding the statements submitted by Skadden is most important to the consideration of those objections. That statement puts matters in its proper framework. It demonstrates -- it demonstrates conclusively, Your Honor, that there is no basis here to undo, to void the fourth extension order. It was entered entirely appropriately following the rules of procedure, 4(m), 9006, in a way that has its roots, as the Court well knows, back to 2007. When the first preservation order was entered back then, the process that was established then was to seal -- seal the complaints, stay -- stay proceedings, and extend the time for service of the complaints.

Now, there were three subsequent extensions, and I will try not to repeat the history in the statement submitted by Skadden or the points made by Mr. Butler but there are some that I will amplify because they are important. But that set the procedure. And in the subsequent two years and a little bit more that occurred after the first preservation order, there were some changed circumstances, and there were some new

developments. And in each occasion, when the debtor came before the Court seeking an additional extension, it was done entirely appropriately under the rules.

THE COURT: Can I interrupt you? Because I read the supplemental submission and I heard Mr. Butler, and I have my views on that. But I want to go to, I guess, a different part of this, which is of the defendants who filed affidavits, which do the debtors agree with, as to their not having received any notice?

MR. SENDEK: Well --

THE COURT: Of the last extension order.

MR. SENDEK: When the Court says "any notice", it becomes a relative term.

THE COURT: I'm stating it broadly --

MR. SENDEK: Okay.

THE COURT: -- on purpose.

MR. SENDEK: At this point, we have responded, I believe, to all of those objections, and in varying degrees, as the Court used the expression "spectrum of notice", we have identified a spectrum of notice that each and every one of them received. Some far more specific than others. And we have done that. The point that we are making is that the whole process didn't require the type of notice.

THE COURT: No, I understand that. I'm just trying to -- I know -- I mean, I'll hear from the others on that.

MR. SENDEK: Right.

THE COURT: I think you all have already made that point. I don't think we need to go over it.

MR. SENDEK: Okay. Here's what we're suggesting, if I may. Notice -- those who claim that they didn't get any notice whatsoever, they were completely in the dark, they were living in a cave, they didn't know that Delphi was in bankruptcy, they forgot that they received a payment within ninety days, be it five million or ten million -- and some of them fit that category -- so they forgot it, it never occurred to them that they might be asked to account for that preference payment. Okay? That's the claim of some. All right? Notice is only relevant in the context of a potential prejudice that has to be evaluated by the Court. And those who did receive absolutely no notice, as I described it, they were in the cave, may have suffered absolutely no prejudice. The records may be readily obtainable. They may have a very good handle on what happened and when, and there may be not a scintilla of prejudice. So notice only has the potential relevance in the context of prejudice to the defendants.

And what we are suggesting, what Mr. Butler alluded to, is a process that goes back to a process the Court discussed in October of 2010 to identify, to make a record on an individualized basis of each and every defendant of those who want to claim that they were prejudiced, how were you

prejudiced. And notice may come into that, but that is the only way which notice is relevant because notice wasn't required to do what we did. That's how it is.

And what we are suggesting and offering to the Court is to submit a motion in the next calendar, the next November calendar, for a procedures order whereby we can define what ought to take place leading up to individualized hearings. Now, it may be some aspect of discovery; we'll work that out between now and then. We'll consult with the defendants. But we'll work that out and come up with a procedure and determine if the people who claim that they are prejudiced were, in fact, prejudiced, and if so, what falls from that. It may not necessarily be dismissal. It may be a weighing of the prejudice claimed by the defendants versus the prejudice that will be suffered by the debtors if the Court were to vacate the 2009 October order, which of course, is severe and irreversible, or could be unless the Court's going to apply some sort of equitable tooling procedure. But those are significant.

And again, to say I knew nothing is one thing, but to say that I was prejudiced is another. And that can't be determined until we establish a record, perhaps with some limited discovery on the subject. But not in a vacuum, Your Honor, and that's why I'm coming back to the point I made originally, is that notice is only relevant potentially in the

context of prejudice. So that's how we see -- there's too much at stake here, Your Honor. There's --

THE COURT: Let me --

MR. SENDEK: -- as Mr. Butler indicated, over 215 billion dollars in preference payments.

THE COURT: Okay. I hope this isn't a curveball to you, but the hearing last June was on the debtors' motion under Rule 15. We had had prior hearings which dealt with Rule 8 objections as well as due process objections, for want of a better word. And I left part of those issues open. And to some extent, they were addressed in the Rule 15 hearing because we dealt with specific futility objections which you all have now done and resolved, by what the amended complaint can and cannot say.

One of the issues, at least in my mind, is defendants' retroactive ability to challenge the Rule 4 extension order, and it seems to me from the case law, that if they got no notice of that, then their ability to challenge it retroactively is pretty much unfettered, as is your ability to -- it's as if we're back in 2009 again, in other words, whereas if they had some notice of it, they may have less of an ability to challenge that. And so what I am raising for you, as well as the other parties, is whether, in terms of managing these remaining adversary proceedings, the hearings that you are positing on prejudice should be ones that cover not only --

or fill in the remaining gaps on your Rule 15 motion, but also deal with those challenges to the Rule 4(m) extension order, and that the record should -- I mean, the facts are the same. The standard may be different, but it seems to me the facts are the same, and I don't see why we would have two hearings as opposed to one on it.

MR. SENDEK: Your Honor, it certainly sounds like it makes sense from a judicial economy standpoint and certainly the debtors' to find out more about what they are claiming and what they would say, so yes, I'm agreeing with the Court. I think that makes sense, reserving, of course, our position that notice of the 4(m) extension as it relates to the fourth and final extension order wasn't required, but of course, I think that can be -- I think the record can be better established in that type of process.

THE COURT: Okay. All right. Now, I think there are unique issues raised by the Wells Fargo motion, so I want to separate out that from the other submissions that are here. But I understand your point, here. So why don't I hear from the other parties, then.

MR. SENDEK: Before I leave the podium, Your Honor, if I may just offer this. There were some new twists, new objections raised by the defendants in their recent briefing. We are prepared to deal with those -- I would suggest the Court defer those, as well -- such as violation of the Rules'

enabling act, separation of powers, and which some of the defendants argue is a basis for voiding the order. Now, we are prepared to respond to that if the Court desires, but I would suggest that if we do follow this procedure, this process the Court just suggested, that that could be adjourned, as well.

With that, I'll sit down. Thank you, Your Honor.

THE COURT: Okay.

All right, I don't know how the objectors have divided this up, if you have a spokesperson as you've done in past hearings before me or if you all want to say your piece. I'm amenable to either approach.

MR. BARRON: Your Honor, Bill Barron. Since I began, I'll continue, at least for the moment.

THE COURT: Okay.

MR. BARRON: And the answer is I don't think we have a fully organized presentation on behalf of all of the thirty-six that you've heard about.

THE COURT: Okay.

MR. BARRON: I would offer at least a couple of comments. First, the issue of prejudice to a defendant as a matter of law, I think, was answered -- and this has been briefed to you, but I'm not sure it's been adequately briefed -- in the Zapata case, Second Circuit case. There, the court stated it's been characterized as dicta in the response from Delphi. I don't think it's dicta. If I may, it's only a

long sentence, and I'd read it into the record. "It is obvious that any defendant would be harmed by a generous extension of the service period beyond the limitations period for the action, especially if the defendant had no actual notice of the existence of the complaint until the service period had expired." It's almost prescient in actually anticipating the bizarre procedural facts of this case. The Second Circuit did reject the district court's sort of pro se holding that any prejudice is presumed as a matter of law if service is made after the period had expired. But that's not relevant here, nor is it relevant to the holding that I've just read into the record by the Second Circuit, which is at 502 F.3d at 198.

THE COURT: I have to tell you, and I've said this in prior hearings, I view that case completely differently. The case gives the Court very wide discretion, and yes, obviously, whenever you extend the time to answer, there's going to be prejudice. There's no limit on it, though. That's just one of the factors.

MR. BARRON: Of course, but we're saying that there's prejudice as a matter of law. And then there's a balancing of equities, and you're quite right, the Second Circuit goes on to point out the district court has that discretion. And the issue is what is the discretion when the fact is whatever the situation is is the result of the plaintiff's own neglect. And to that point, the two cases that were cited earlier by the,

I'll call them the "no notice defendants" and responded to by Delphi, one of them was a Ninth Circuit decision, the so-called Fimbres case, Fimbres v. United States, 833 F.2d 138. And that one noted what, frankly, is obvious in every 4(m) case other than this one, which is that 4(j) -- that was the predecessor of 4(m) -- "is intended to force parties and their attorneys to be diligent in prosecuting their cause of action"; 4(m) was never designed to be a blank check not to serve.

THE COURT: I've heard all this, sir. I heard this a year ago. We're focusing on one issue. This is like deja vu all over again. We've dealt with this.

MR. BARRON: Well, if --

THE COURT: I don't think -- did you -- I don't actually think your client made the objection a year ago, but we dealt with this.

MR. BARRON: We objected when we filed our answer --

THE COURT: Okay.

MR. BARRON: -- fulsomely.

THE COURT: Not fulsomely, but okay.

MR. BARRON: And I will defer, then, to any of my other colleagues who wish to address the Court.

THE COURT: Okay. I'm not -- really, I'm not trying to put you down or anything, but I've already -- I heard all these arguments. I heard them back in 2010 and deferred ruling on the due process issue after a very lengthy hearing when it

became clear to me that the complaints at that time should be focused on because they were, in my mind, serious gatekeeping issues for the debtors to go forward on a large number of them, and that's been borne out.

MR. BARRON: Yes.

THE COURT: But I -- I really wanted to focus in this -- today on the issue of -- which was raised, I think, by only one or two parties, but it was enough to bother me for everyone, which was the notice issue on the fourth extension.

MR. BARRON: Understood.

THE COURT: So, I mean, the issue about this being unusual, I get that. I understand that. The issue of the fourth extension, or the last extension being on a different rationale than the first three, I get that, too. But I also get that under Zapata, the court has enormous discretion in light of what was the state of play at the time to grant or deny a 4(m) request, and I want to set a proper context for evaluating that retroactively in light of all of the motions to dismiss, which to my mind depends upon whether people got notice or not. But I don't view it specifically as a gatekeeping issue, but I wanted it to be considered separately by everyone because I don't think it had really been addressed prior to today, specifically, before we got into what I contemplated to be the next step of this, which is focusing on that inquiry, that retroactive inquiry.

MR. BARRON: As to the notice issue, if I may, Your Honor, you addressed a question to my esteemed adversary as to which of the affidavits, if any, do the debtors disagree with.

THE COURT: Right.

MR. BARRON: I can speak only for my own; I haven't read -- the fact is, I haven't seen any declarations from the debtors' side. They did file in an amended -- a series of numbers, they gave them exhibit numbers for each of the defendants. I was exhibit -- Heraeus was Exhibit 31. And with that, they served unsigned, unsworn statements, in effect like briefs commenting on either the record or otherwise. In my case, there was no disagreement with any affidavit that we had filed, nor was there any actual argument that actual notice had been given, but rather what I call the constructive notice or the imputed notice or some other kind of alternative notice that somehow the defendant should know, should have known or could have known.

THE COURT: Right.

MR. BARRON: And so in that sense, there's no disagreement that I'm aware of, at least with Heraeus declarations, of which we filed several.

THE COURT: All right.

MR. BARRON: There may be with others; I can't speak to that.

THE COURT: And on that score -- and this is why I

asked the question; I guess I was jumping ahead of it -- it seemed to me that if I am going to enter a scheduling order for the company and the defendants lead up to individual hearings on the combined issue of the prejudice factor under Rule 15 and cause under Rule 4, if there's no dispute about the nature of the notice that was received, then obviously, no one has to take any discovery on it. And it seems to me that that's the case. I'll hear from the debtor on that, but if a defendant, like Heraeus, submits an affidavit that says we didn't get notice and we didn't know about this until we were served, and the debtor hasn't given anything -- any basis to say otherwise, then I think that notice issues off the table, and I should assume that that's true. On the other hand, if the debtor filed a statement that said -- well, the easiest would be, well, we did serve them, I guess the next easiest would be we were in discussions with them so they had to have known it, then I think there's a live issue there that I need to hear at some point.

MR. BARRON: Thank you, Your Honor.

MR. KLEIN: Your Honor, may I respond?

THE COURT: Sure.

MR. KLEIN: And I'll be very brief. And this was a part of --

THE COURT: Could you state your name for the record?

MR. KLEIN: I'm sorry. Sheldon Klein, Butzel Long on

behalf of the debtors, and I'm responding because originally there was a series of questions that I was planning on addressing based on the Court's comments. Virtually all of them now are on the cutting room floor. But I do want to address this question of revisiting 4(m) issue.

First of all, the 4(m) order is an interlocutory order and as a general matter, of course, the Court has the discretion to revisit its interlocutory orders. There are facts and circumstances here that are unique, far different from the usual interlocutory order that bear on what the Court should do. In revisiting it, I suspect the time for discussing that is at a later time when we actually have a hearing on the 4(m) issues, and therefore, I just want to note that we don't view this as a generic reviewing an interlocutory order issue.

Finally --

THE COURT: But I do think, and I think this is consistent with the case law, that if the 4(m) order is issued ex parte, the review is much more open. It's a much more -- as if it was de novo type of review.

MR. KLEIN: Well, I have a hard time understanding that, Your Honor.

THE COURT: Well, I -- I'll ask the parties to focus on that, but -- and as I said, I hope I'm not throwing a curveball at you all. And I'm really focusing more in preparation for the hearings --

MR. KLEIN: Yeah.

THE COURT: -- that I think will be happening in the future. But that's my belief, at least.

MR. KLEIN: Okay, and can I ask, when you said "I'll ask the parties to focus on that," do you mean at some point down the road?

THE COURT: Yes.

MR. KLEIN: Because I don't want to spend your --

THE COURT: Yeah, no, not today. I don't expect you to have been prepared on that issue.

MR. KLEIN: Okay, I mean, well, in fact, we were. However, I do agree that it makes sense, in part because I certainly agree with you that any conceivable fact that is relevant to a possible 4(m) reconsideration is also relevant to the Rule 15 issues, and therefore, assuming for the sake of argument there's a 4(m) issue, it makes sense to deal with them together.

The only final point that I want to make is it continues to be our position that whether viewed as a Rule 4(m) reconsideration or as a Rule 15 decision, prejudice and balancing of prejudice is the essential core from either perspective, and so to that extent, I would disagree with the Court that it is possible to resolve the 4(m) issue, at least in terms of the substantive outcome of any reconsideration based solely on the present record. It may be possible that

the Court can decide that 4(m) reconsideration is appropriate, but the outcome of that reconsideration, we believe, is inappropriate precisely because, as the Court suggested --

THE COURT: You mean today?

MR. KLEIN: No, I mean at any -- okay, perhaps I misunderstood the Court's comments in terms of the present state of the record and what the judge can decide.

THE COURT: Well, I wasn't planning on ruling on the 4(m) today.

MR. KLEIN: Okay, then I suspect I misunderstood the Court's comments --

THE COURT: Okay.

MR. KLEIN: -- and I will sit down.

THE COURT: Okay.

MR. KLEIN: Thank you, Your Honor.

THE COURT: Um-hum.

MS. BRAUN: Good morning, Your Honor. Beverly Braun for Jamestown Container --

THE COURT: Yes, good morning.

MS. BRAUN: -- one of the defendants. And I don't presume to speak for any other defendant. From our perspective, I believe we're at a place where individualized hearings where we can address the 4(m) and the prejudice issue at once would be particularly apt. It seems as though the claims are now becoming more and more particularized based on

the particular facts, and like Mr. Butler, I presumed after our last hearing in June that there would be individualized hearings dealing with the specific issues for each defendant. I can't believe I'm actually going to say I agreed with the debtor.

THE COURT: Yeah, he was writing that down. He's going to frame that.

MS. BRAUN: And I'm going to put the caveat on that issue and that issue only --

THE COURT: Okay.

MS. BRAUN: -- as to there would be hearings.

THE COURT: Okay, all right. Okay, thank you.

MR. LAWHORN: Good morning, Your Honor. Chris Lawhorn from the Bryan Cave law firm on behalf of the defendant Spartech Polycom. Your Honor, our adversary proceeding number is 07-02639.

Your Honor, at the last hearing, the Court ended the hearing by saying in my gatekeeper role, I want to know who received notice, what type of notice did you receive. So my client, Spartech Polycom, filed the declaration of one of our businessmen, Chad Tomsheck, who confirmed that Spartech received none of the extension motions. And in fact, our motion went further to say that we have been prejudiced, and we specifically identify the prejudice we suffered by stating, Your Honor -- this is paragraph 9 of the declaration -- "among

other things, Spartech has lost the ability to identify, locate, and preserve its records that are relevant to the claims in the complaint and to preserve information from Spartech employees knowledgeable about Spartech's relationship with the debtors."

Your Honor, we believe we did exactly what Your Honor had requested in your gatekeeping function, and we believe Your Honor can rule, at least as to our client, and perhaps those similarly situated --

THE COURT: Well, but I directed people to file affidavits on notice. I didn't direct people to file affidavits on prejudice.

MR. LAWHORN: Correct, Your Honor, and our declaration does both. I was simply pointing out to Your Honor, to the extent the debtors are wanting to add the second piece of prejudice, our declaration does that. But the first part clearly says, Your Honor, Spartech has received no notice as to any of these issues.

THE COURT: Right.

MR. LAWHORN: And the response we received, Your Honor, was not they disagree -- they, the debtors, disagree with any of that. The debtors point simply to the first amended disclosure statement and the SEC filing. Your Honor, there's been no other counter or rebuttal to our declaration.

THE COURT: Okay.

MR. LAWHORN: Unless you have questions, Your Honor, with that, I believe that's --

THE COURT: Well, I -- this goes back to the point that I made earlier. I'm not sure the debtors have responded to it. I'm going to leave the prejudice point aside, because I do think that's not what this hearing is about. On the notice point, Spartech files its declarations, says it didn't have notice. If the debtors don't refute that, except to say sort of generally, it was in the air, which is sort of in your general statements, that there might have been preferences to some people, it would seem to me that I don't think that that should -- that notice should be the subject of the deposition anymore. Am I missing something on that? As opposed to there being a specific response where the debtor says, well, you know, Mr. X of DAS spoke with people at Spartech and one of the things they talked about was the potential for preferences, you know, something like that where there's some specific allegation that they were, at least on -- if not service of process notice, notice that this issue was a real issue, and so therefore, they weren't prejudiced. And then it would seem to me that that would be something that the parties would be developing in fairly focused discovery in advance of the hearing.

MS. HAFFEY: May I respond?

THE COURT: Yes.

MS. HAFFEY: This is Cynthia Haffey. Your Honor, I think this is one of those examples of the spectrum of notice and why the individualized hearings are important. Spartech received, in addition to what Mr. Lawhorn told you, they also received notice of the confirmation hearing and the solicitation procedures order. And as this Court recalls, that's docket number 11974, the solicitation procedures order specifically dealt with the preservation of claims process.

THE COURT: No, I understand. I understand that point, but I was kind of putting it to you a little more harshly, which is that if that's it, if that's the only point, I'm not sure why there needs to be any discovery. Because they've said they didn't know.

MS. HAFFEY: Well --

THE COURT: Even though they had that notice, they didn't know. So it seems to me it's a straight issue for me as to whether that thing in writing, that notice of the disclosure statement is enough. I don't think you need to spend money on discovery because that's all you're relying upon.

MS. HAFFEY: Well, and my response, and not talking specifically just to Spartech, Your Honor, but the affidavits are, themselves, a spectrum.

THE COURT: No, but I'm trying -- you're going to have some looted discovery on prejudice, right?

MS. HAFFEY: Yes.

THE COURT: I'd rather not have whatever thousand dollars would be spent on notice issues spent if we've already gone through it and the only objection is based on this generic point, which is they got notice of the plan and the confirmation order and the disclosure statement, all of which say what they say, and the missing link is that there's no suggestion, and in fact it's contradicted by an affidavit that those notices hit a synapse and those people realized that they were at risk. And they filed affidavits to say no, it didn't happen.

MS. HAFFEY: And I don't think we're on a different page with this, Your Honor. I think we're in agreement that the discovery, as Mr. Sendek laid out, would be a limited discovery as to where it was necessary within the affidavits.

THE COURT: All right, so you -- so in other words, you're obviously preserving your argument --

MS. HAFFEY: Yes.

THE COURT: -- that they were on inquiry notice from those documents, but just assuming that the affidavit says we didn't know, period, we didn't put two and two together, we didn't know, that you wouldn't spend two hours questioning them on did you really mean that.

MS. HAFFEY: That's correct, Your Honor.

THE COURT: Okay.

MS. HAFFEY: And the only caveat to that is if there's

an affidavit or there's a question as to --

THE COURT: No, each affidavit -- some affidavits may be more equivocal --

MS. HAFFEY: Exactly.

THE COURT: -- and more artfully drafted than that.

MS. HAFFEY: Exactly.

THE COURT: Okay.

MS. HAFFEY: Thank you, Your Honor.

THE COURT: Like, I think that MGK, or --

MS. HAFFEY: That's --

THE COURT: No, but I think that one, you point out it has a hole in it.

MR. LAWHORN: And Your Honor, just further on behalf of Spartech, we don't believe there's a need for a second step in this process, which would be the secondary discovery, perhaps in another hearing individualized to our client, unlike the person who's on the phone, not in the courtroom, we, Your Honor, believe that the law is adequate. We've briefed it and I don't believe Your Honor wants argument on it, unless you do, in which case I'm happy to give the argument to you. We believe Your Honor could exercise today your discretion, and say at least as to Spartech and defendants similarly situated who received no actual notice, that those claims can be dismissed.

THE COURT: Well, I know that I could do that. I

don't think I have to.

MR. LAWHORN: I agree. And my question to you, Your Honor, is if you'd like to hear argument, we're prepared to make those arguments because we believe it's appropriate, Your Honor.

THE COURT: The argument that I have to?

MR. LAWHORN: I'm not saying you have to. I'd like you to, but you don't have to. And Your Honor, one other thing, my client is in the courtroom, today. And I just want to make it very clear to Your Honor that my client doesn't live in a cave, that my client was never served with any of these papers. My client, even to the extent they knew that there was a preference period and they received transfers during that preference period, once the statute of limitations is over, what is my client supposed to do when they receive no notice of a filing under seal of a lawsuit against them, all the while, the debtor continues to do business with them, never once telling them that they've been sued for nine million dollars. So Your Honor, my client would not take very kindly to the characterization of living in a cave, so we just want to make on the record that very clear that many of us defendants do not live in a cave.

THE COURT: Well, I know that.

MR. LAWHORN: Thank you, Your Honor.

THE COURT: They're not cavemen. They're not the

GEICO guy.

MR. LAWHORN: Precisely, Your Honor. Thank you.

THE COURT: But I mean, that's the debtors' point, I think, that the sophistication of the parties is important.

MR. LAWHORN: Thank you, Your Honor.

MR. WURST: Good morning, Your Honor. Ruskin Moscou Faltischek by Jeffrey Wurst on behalf of Wells Fargo. I'm not sure if in your remark before if I'm premature in standing up or if you want just to wait.

THE COURT: Well, there were two Wells Fargos. I'm really focusing on Mr. Silverschotz's Wells Fargo, not yours.

MR. WURST: That's fine, okay.

THE COURT: Yours was within this group, I think.

MR. WURST: It certainly was, and when we've been speaking, I've referred to Wells Fargo as the poster child of this issue based on the June 21st hearing.

Shall I go on? It looks like you were about to say something.

THE COURT: No, go ahead.

MR. WURST: And I'm going to limit this to notice, although I was very moved before by Mr. Butler's presentation which, candidly, brought to mind a major theme in literature, point of view. And certainly, this Court has heard the point of view of the debtor for years but really hasn't had the opportunity, until these proceedings, to hear the point of view

of the defendants. If I can make a reference to literature, the wonderful poet James Dickey who's best known for writing Deliverance, where he made money, but his poetry was really his great art, wrote a poem in 1964 called The Firebombing. And he discusses the differences in points of view from the pilot firebombing Japan during World War II to the point of view of those down on the ground who were close to the destruction caused by those firebombs. Well, we, here, today are hearing the other side of this point of view.

It is undisputed that Wells Fargo did not receive actual notice of any of the extension notices. There's not even an allegation that they received imputed notice of any of the extension motions. Our reference is Exhibit 57 where the debtor claims Wells Fargo received notice because the debtor filed an 8(k). Well, the firebombing was from 20,000 feet above. There are over 20,000 reporting companies. To expect Wells Fargo to read and follow 8(k)s in 20,000 filing companies, I think is just approaching absurdity.

But again, in this case, Wells Fargo did not have a direct relationship with these debtors. They factored two entities that did business directly with the debtor. That gets more to the prejudice side, so I'll skip that, but that's the reason Wells Fargo wasn't getting notice. The only notice of anything in these proceedings --

THE COURT: Well, you wouldn't have gotten notice

anyway, then, probably, if they'd given -- they wouldn't have given it to you anyway.

MR. WURST: Exactly right, and they didn't.

THE COURT: Even if they were giving notice, they wouldn't have given it to you.

MR. WURST: I didn't follow that; I'm sorry.

THE COURT: If you step into the shoes of your debtor --

MR. WURST: Yeah.

THE COURT: -- they would have given notice to your debtor, at some point, but that wouldn't assume you would have gotten it.

MR. WURST: What I find interesting -- and let me just raise one other point -- they claim the notice we got was notice of the confirmation hearing which was sent to some individual in the corporate trust unit at Wells Fargo. The corporate trust usually hold stocks or something for the benefit of some third party. And we submitted an affidavit from our business group; they don't know anything about that person. He doesn't appear to be employed at Wells Fargo any longer, and there's no way they were given notice.

What is interesting, though, and yesterday, as I was thinking about this, I said, let me go revisit the affidavit of service of the complaint which took place years later. But when it got to the affidavit of service of complaint, they

managed to send it exactly to the right place. So on April 6th, 2010, the debtor knew exactly who the defendant was, they knew how to get notice to us then, but they didn't know or consider getting notice at any time before. So Wells Fargo had absolutely no notice of the bankruptcy. As big as the bank is, apparently it didn't have money at risk with Delphi because it was not given notice of any of the proceedings. That seems hard to imagine, but as luck has it, Wells Fargo was not getting notice of the proceedings.

But my colleague will speak from Wells Fargo from the Wachovia point of view an acquisition that took place someplace during the road.

So we fall right into the absolutely no notice unless the Court is inclined to believe that the filing of an 8(k) or a single notice of a confirmation hearing is fair notice, and we submit it's not. Hopefully, we don't have to go through the discovery process to show prejudice. That will be a whole other issue.

But the basic tenet of American jurisprudence is fair notice. And yes, there are exceptions to that for ex parte --

THE COURT: Including 4(a) of 9006.

MR. WURST: Well --

THE COURT: 4(m), I mean.

MR. WURST: -- 4(m), yes. And that's what I was about to say. Except for good reason shown. But of course today,

we're looking at it from a different point of view. Now we're looking at it from the defendant's point of view. There was no one here during the first, second, third, or fourth extension motion to say, hey, Judge, perhaps we should consider the rights of defendants. You had to do that on your own. And perhaps they did, perhaps they did not bring out the risks inherent.

THE COURT: Well, the creditors' committee supported it.

MR. WURST: Well, the creditors' committee did, but the creditors' committee certainly wasn't representing clients like mine.

THE COURT: And the debtors assert, and I'd be interested in anyone's response on this, that there were, at various times, between nineteen and twenty-two defendants that did get notice, and they didn't object.

MR. WURST: Then they certainly have no right to object now. But I represent the client that didn't have control over the papers -- that's the prejudice issue -- the factored clients are long defunct. So if we have to get down to discovery on that, we'll go there. I just don't think it's necessary.

THE COURT: Discovery on what?

MR. WURST: Discovery on the prejudice issue. So I certainly hope that Wells Fargo doesn't have to get to that

point because we had no notice, and even when we read the debtors' appears, they concede they had none. I'm kind of surprised that with all of the time we spent on June 21st, that the debtor couldn't find a single matter where, yes, maybe this wasn't fair notice; we'll let them out of the case. But no, they continue to protest now. Methinks they protest too much. So let's at least get one posted trial out of the case. Thank you.

THE COURT: Okay.

MR. NAGI: Good morning, Your Honor. Jason Nagi from the law firm of Polsinelli Shughart on behalf of Florida Production Engineering. We're one of the no notice defendants but there's a bit of a contest about it. I'll just give you a couple of facts to keep you up-to-date.

Florida Production filed a notice -- a proof of claim, I should say in this case. On September 26 and for everyone's clarification, we're number forty-seven on the omnibus reply.

MS. HAFFEY: Thank you.

MR. NAGI: You're welcome. On September 25, 2006, Don Mallory of Dinsmore & Shohl, filed a notice of withdrawal and withdrew its claim. At that point, Florida Production was out of the case. Dinsmore & Shohl didn't represent Florida Production anymore. The debtors never served Florida Production with a disclosure statement. They claim they do but when you look at our reply, what it indicates is we were served

with the notice of a confirmation hearing. And that's all that we were served with. Obviously, that notice said nothing about preferences.

And by the way, Your Honor, at the time the disclosure statement called for a one hundred cent plan. So the notice that we would have had that we were up for preferences diminished even further had we been served with the disclosure statement; we weren't.

We were not served with one of the four extension orders and we weren't served with the disclosure statement. What the debtors say in response to that, aside from the 8K and the notice because everyone knew about Delphi was that --

THE COURT: I'm sorry. Let me make sure I -- when you say you weren't served with one of the four extension orders, you mean you weren't served with any of them.

MR. NAGI: That's correct. We were not served with any extension order.

What the debtors say in response to this is well, we served Dinsmore & Shohl with the fourth extension order eighteen months after Florida Production had withdrawn its notice of claim and we served Dinsmore & Shohl on behalf of Proctor & Gamble. Therefore, you had notice because Dinsmore & Shohl used to represent Florida Production.

So essentially, what they're saying is that you could have notice to a separate party that is completely unrelated to

Florida Production and that can serve as notice to Florida Production which pretty much exited the case eighteen months prior by the accident of common counsel. That's kind of a like Rube Goldberg contraption. That's not really due process.

Those are the specific facts here that we have. That's what I believe separates us and makes us one of the candidates as a true no notice defendant.

THE COURT: Okay. Well, if that -- I mean if the only basis for saying there was actual, as opposed to assumed notice through the disclosure statement hearing notice is notice on counsel and when counsel's wearing his other hat, I understand your point.

MR. NAGI: Thank you, Your Honor.

MS. HAFFEY: But it's not, Your Honor.

THE COURT: Okay.

MS. HAFFEY: And I can go into the specifics if you would like or save these for the individualized hearings.

THE COURT: Well I mean I guess where I'm coming out on this because I'm looking for a way to streamline this, I guess what I'm going to have to say is where there are disputes like there may be here, if you have discovery on it and the defendant thinks it's obvious that there shouldn't be any more discovery and the debtor disagrees, you can have a telephonic conference with me right away on that issue.

MS. HAFFEY: We'll put that in the procedures order,

Your Honor.

THE COURT: Okay. But I mean obviously if it's just service on someone's former counsel who happens to be still in the case because he or she is representing someone else, then you don't need a telephonic conference on that one. There shouldn't be discovery on that basis.

MS. HAFFEY: Understood.

THE COURT: Okay.

MS. HAFFEY: But as I said, the

THE COURT: No, I know.

MS. HAFFEY: Yes.

THE COURT: I understand.

MS. HAFFEY: Thank you. Sure.

THE COURT: Okay.

MR. SILVERSCHOTZ: Good morning, Your Honor. Mark Silverschotz, Reed Smith for Wells Fargo, N.A. I'm here with my colleague Sarah Kam.

As Your Honor pointed out, we have a separate motion pending and we are, we think, in a -- presented by a unique set of circumstances. The only reason I'm up now in connection with this item is to make inquiry of the Court as to whether Your Honor or perhaps debtors' counsel would prefer to address the Rule 60 motion as a free-standing motion now which I, of course, am prepared to do after this matter is finished, or subsume it within whatever procedural --

THE COURT: No, I think it should be addressed separately.

MR. SILVERSCHOTZ: Okay, fine. We'll wait for that then.

THE COURT: Okay. It may end up getting subsumed but because it was brought as a separate motion, the debtors, rather than dealing with the procedure I laid out on June 21 dealt with it in its entirety. So I think it's potentially resolvable on its standalone basis.

MR. SILVERSCHOTZ: Thank you, Your Honor. We'll wait.

THE COURT: Okay.

MR. SENDEK: Your Honor, just for clarification, is the Court's suggestion that we deal with that motion separately at a separate event?

THE COURT: No, today.

MR. SENDEK: Today.

THE COURT: Today. But I think we shouldn't get -- unless we're done with the other people who filed objections or submissions, in which case I'm happy to turn to Mr. Silverschotz's motion, but I'm happy to hear anyone else, too. All right.

Let me address then the various pleadings that were filed at my direction from June 21, 2011 and that direction was for defendants to flag their specific notice that they received if they want to rely upon notice as a basis for or lack of

notice more properly put, as a basis for their objection to the debtors' motion for leave to amend under Rule 15.

I requested this in particular because of my re-review of the last extension motion, the transcript of the hearing on it and my September 22, 2009 order, which was the last extension order, as well as the issue raised by at least one party and I think it was Victory Packaging, although maybe I have that wrong, that leaving aside all the other notice issues, the very fact that this was intended to be by the debtor, ex parte, that there was something about the fourth extension order that was in addition to or crates an impediment for the debtors, in addition to the arguments that numerous parties have raised and continue to raise, that the fact that the orders were granted ex parte means that I should vacate them or that the motion to amend would be futile.

I received thirty declarations with respect to notice, as well as, of course, the debtors' supplemental filing and I've gone back and read yet again the last extension motion in the transcript of the hearing and the order and I find that the motion transcript and order do not reflect a clear violation of the notice procedures established in this case years earlier in the case, which require particularized notice or service directly to a party-in-interest who is directly affected by a particular motion.

I say that because clearly the premise behind the

first three extensions was that they needed to be ex parte since the debtors' rationale for seeking those extensions was that it was unlikely that they would need to bring these cases on an active basis or these adversary proceedings and litigate them on an active basis, given the nature of their plan and the likelihood that ultimately, they wouldn't be pursuing preference avoidance claims, given the substantial recoveries by unsecured creditors.

And consequently, the disruption to their business over parties litigating and reacting to preference complaints, really would be unnecessary given that most of those complaints, if not all of them, would be withdrawn upon the effectiveness of the plan.

That was, in fact, the notice assumption for the initial extension order and the subsequent ones and it's fair to believe that the debtors concluded that that would apply to the last one also, even though the rationale for the last one was not premised upon business disruption but rather upon the need to have more time simply to focus on which preference complaints to litigate.

In addition to that, the orders themselves required specific notice to three parties which is inconsistent with the notion that all defendants would be getting notice of the motion. So it appears to me that with regard to the last extension order, which is the one that I was focusing on at the

June 21, 2011 hearing and which I've been focusing on today, the facts as I see them are not such that I believe the debtor should be precluded from pursuing lawsuits against parties that did not receive actual notice of that order, that extension order, merely because of that fact.

Therefore, it appears to me that we're really back at the state of play that we were in on this issue, on the issue of the ex parte issuance of the extension order, where we were last year when I was dealing with motions to dismiss premised upon due process or other arguments to cause me to vacate the 4(m) order. The record certainly has been made clear as to the extent of notice but I think that record is not such that it would lead me simply to deny the Rule 15 motion today on the basis of any of the four factors that I need to consider when evaluating such a motion.

I don't believe as a matter of law that the filing in pursuit of the amended complaint would be futile on this basis, simply on the basis that the orders were obtained ex parte since the rule, as well as Rule 9006, although I'm really focusing on Rule 4(m), contemplates ex parte relief and as laid out by the Second Circuit under the Zapata case, gives the trial court almost blanket discretion to grant such relief.

Given my views that I've just articulated, with regard to what was reasonable for the debtors to assume in connection with the fourth -- with the last extension order as to notice,

I don't believe that the debtor has acted in bad faith. I don't believe that has been undue delay in bringing the Rule 15 motion and finally, the issue as to whether there would be prejudice to the opposing party in my permitting the complaint to be amended, and while prejudice is a legitimate issue to consider in connection with the Rule 4(m) review that I believe should be undertaken, I don't believe that there is sufficient prejudice in permitting the complaint to be amended to preclude the amendment. Again, that is distinguished from whether now that there has been obviously notice in my retroactive review of the extension order, I should find sufficient prejudice to vacate that order, which of course would mean that the complaints were untimely.

So, I think that the parties should move to the next stage in this litigation which, with respect to the thirty-six objections to the Rule 15 motion, would be a focus on individual hearings with regard to whether I should vacate the 4(m) order which is primarily to be based upon prejudice which would include, and I believe at this point the record has been substantially clarified, a consideration of the notice to the other -- to the defendants or the extent of notice, although I guess I could imagine a scenario where a defendant received no notice, neither actual nor presumptive, and yet was not prejudiced in any way, i.e., all of its witnesses are still there, it didn't enter into any transaction and reliance on

their being no preference exposure and I would find that there would be no basis to vacate the 4(m) order as to it for that reason.

On the other hand, if someone did receive notice, I think it would be quite difficult for them to argue prejudice. And finally, if someone did not receive notice and had some level of prejudice, I think it is appropriate for me to consider that they didn't receive notice.

And again, leaving aside the Wachovia motion, I think the parties should focus on a schedule for my resolving those issues and ultimately the main issue of reconsideration and not under Rule 60 but simple reconsideration by me in my discretion of the 4(m) orders. The parties haven't had time, I guess to discuss a schedule for that or something I think Mr. Butler alluded to as a potential ADR of it. Am I wrong about that or have you discussed it?

MS. HAFFEY: Not in any group sense, Your Honor, no.

THE COURT: Okay. At this point, is there kind of a steering counsel or group, no, on the defendant's side? You're each pretty much on your own at this point?

MR. KLEIN: There is not, Your Honor, but I think it's something at this point now that we're focusing will be appropriate.

THE COURT: Okay.

MR. KLEIN: We'll consider that among ourselves while

we're here.

THE COURT: All right. Well, I would like you to meet and confer about that process and I'm happy to hear from you very promptly. I could do it on a telephonic conference later this week to see where you are on it, including whether you want to have a mediator appointed to deal with those issues, too in the first instance.

Obviously, thirty-six hearings is going to take some time for me, even if they are limited to say half a day but I am prepared to do it or if you want to have some test cases, you know, there are some that fall in certain fact patterns and some -- or if they do, common fact patterns or you could set it up for mediation if you want to.

So if we scheduled a call say for the end of this week, for you all to air with me where you are on a process for dealing with that issue, would that give you all enough time to talk about it?

MR. KLEIN: Hard to say since nobody everybody is here, of course.

THE COURT: Right.

MR. KLEIN: Many are on the phone but I am not even sure who is on the phone.

THE COURT: Right.

MR. KLEIN: I would think that maybe ten days is a wiser timetable.

THE COURT: You want to do it next week?

MR. KLEIN: If not this week; yes.

THE COURT: Okay.

MR. KLEIN: Would your office be able to -- assuming mediation is not an attractive alternative, would your office be able to provide us with any blocks of dates that --

THE COURT: Yes.

MR. KLEIN: -- might still be convenient for Your Honor?

THE COURT: Sure. You could check with Ms. Lee about my calendar. I'm assuming that it would probably be -- you'd probably want some limited discovery and it would be probably in February, I would think.

MR. KLEIN: Thank you.

THE COURT: February or March.

MS. HAFFEY: Your Honor, can I suggest that the debtors propose an order, a procedures order?

THE COURT: Well, you could circulate that to the objectors.

MS. HAFFEY: Okay.

THE COURT: Yes, you could do that if you wanted to but it may make sense for you to spend a little time with them first --

MS. HAFFEY: Oh, certainly.

THE COURT: -- before you do that. And when do you

think you could circulate that order by?

MS. HAFFEY: Within a week, sometime next week.

THE COURT: Okay. So by Monday next week?

MS. HAFFEY: Sure.

THE COURT: And then maybe we could set up a call for Friday next week, unless you're still talking about it and then you can put it off. But in the meantime, you can get a block of dates.

MS. HAFFEY: We'll circulate it on Monday and then we can advise the Court's clerk --

THE COURT: Right.

MS. HAFFEY: -- as to whether the parties are ready to talk at the end of the week or --

THE COURT: Right.

MS. HAFFEY: -- we need more time.

THE COURT: I mean, this is a fairly small number at this point.

MS. HAFFEY: Yes.

THE COURT: And in several cases with larger numbers, judges have gotten their colleagues to act in non-binding mediation on much -- 2000 preferences, for example. So that's probably achievable here too. I'm not sure anyone would want to mediate just the 4(m) issues though. They'd probably want to throw in the underlying preference issue. But you all should consider that as a possible alternative. But it may be

a small enough number, so that we would just go right to a hearing on that issue, limited again to the 4(m)-15 issue.

MR. KLEIN: Your Honor, could I ask for a point of clarification? Earlier than no more than four minutes ago, you were going through your current views as to the different sort of lack of notice and some prejudice or no prejudice or what you think the likely result without --

THE COURT: Right.

MR. KLEIN: -- being a holding, of course.

THE COURT: Right.

MR. KLEIN: I either -- either you lowered your voice or something interfered with my hearing with what I thought, many will of course claim, which is complete lack of notice and at least some prejudice, lost witnesses, lost documents, and the like --

THE COURT: Right.

MR. KLEIN: -- where you felt that would be likely to play out.

THE COURT: Well, that's the most appealing issue for a defendant --

MR. KLEIN: Of course.

THE COURT: -- an appealing fact pattern for a defendant but a lot -- there's a lot of the details about missing, you know -- what does it really mean, missing documents, so --

MR. KLEIN: Of course.

THE COURT: Right.

MS. HAFFEY: Thank you.

THE COURT: Okay. All right.

UNIEDENTIFIED SPEAKER: Your Honor, could we take a quick break before the last motion?

THE COURT: Yes, sure. Ten minutes?

UNIDENTIFIED SPEAKER: Thank you, Judge.

(Recess from 12:13 p.m. until 12:24 p.m.)

THE CLERK: All rise.

THE COURT: Please be seated. Okay. We're back on the record in DPH Holdings. So, we're clear about the timing then on the next steps with regard to the thirty-five objectors; proposed order by the debtors by next Monday, hopefully after reaching some consensus with the objectors before then and then if we need to, we'll have a telephonic conference either that Friday of that week or if you still need some more time later, the following week and you can get a block of time from Ms. Lee today if you want.

MS. HAFFEY: Yes.

THE COURT: Okay. All right.

MS. HAFFEY: Judge, we're clear and we spoke with defense counsel during the break and they're going to see if they can get a couple of spokespersons for us to work with, so we'll expedite it.

THE COURT: And then, it seemed to me that mediation could be useful here if you were in the position to focus on the merits, as well, so you could actually get to a final result. I'm not sure whether the parties are at that point or not but if you are, that's something that you should raise. I'm not sure if mediation is sufficient, just as to these threshold issues that I've been dealing with now for over a year. But it would be, if you could get to the merits with a mediator.

MS. HAFFEY: It's our position, Judge, that the majority of the cases that at least we are in that position, I believe.

THE COURT: Okay. And then Mr. Butler said there are really fifty-eight active cases.

MS. HAFFEY: Yes. Fifty-seven actually; one resolved this morning.

THE COURT: Fifty-seven.

MS. HAFFEY: And the --

THE COURT: I have no problem with the debtors seeking a default judgment on the others and then as far as the -- it's not clear to me, the twenty-one where there weren't objections to the Rule 15 motion, were there objections or motions to dismiss though on those remaining twenty-one?

MS. HAFFEY: If you'll --

THE COURT: If not, we should have a pretrial

conference and move and deal with discovery on those.

MS. HAFFEY: Very good, Your Honor. I just have to look at my chart to see.

THE COURT: Right.

MS. HAFFEY: My recollection is there were motions to dismiss as to some of them but not to all of them.

THE COURT: Okay. Well, I guess the ones where there wasn't a motion to dismiss, we should, you know --

MS. HAFFEY: Okay.

THE COURT: -- have a pretrial conference on those and/or just if the parties just want to agree to a pretrial order and move into the discovery phase on those, that's fine.

MS. HAFFEY: Very good.

THE COURT: Okay.

MR. SILVERSCHOTZ: Your Honor, it may not make a difference or it may make a difference, we filed a joinder and prior to the June 21 hearing, there was some confusion in the agenda about whether we were included or not included and whether or not we're in the thirty-seven or thirty-eight. We think we would be if we're still around. And I would just throw that out there for something for Ms. Haffey can either to perhaps double check on before we finish up.

MS. HAFFEY: As to the fifty-seven active cases, Wachovia-Laneco (ph.) case is included.

MR. SILVERSCHOTZ: It's an active case but in terms of

the Rule 15 issue, Your Honor, I just wanted to make sure we were in that group and -- but that, as I say, is a purely -- it's a pure issue of documentation rather than any substance at all. We'll worry about that at the time.

May I proceed, Your Honor?

THE COURT: Yes.

MR. SILVERSCHOTZ: Good afternoon. Mark Silverschotz again, Reed Smith, for Wells Fargo Bank, N.A., with my colleague Sarah Kam.

Your Honor, you mentioned this morning that our situation is somewhat unique and to the extent that this motion causes the Court to hear yet again the same arguments that have been before Your Honor for a period of time now, I apologize. That's not our intention.

And one reason we didn't rise in connection with Mr. Butler's presentation regarding the supplemental filing is speaking on my own behalf, I was actually very pleased to get the filing that Skadden put in because it brought together all sorts of items that frankly hadn't appreciated before. And from the stand point of Wachovia/Wells Fargo, we really think the story is a simple one.

MR. BUTLER: Your Honor, if I may just interrupt the argument, just so the record is clear, I am present in the courtroom today for the purposes of the motion we provided. I'm no participating in this adversary --

THE COURT: Right.

MR. BUTLER: -- on either side and I just want the record to be crystal clear on that point.

MR. SILVERSCHOTZ: Understood. I am sorry. And I understand why and I certainly didn't mean to bootstrap Mr. Butler into this particular hearing.

THE COURT: Okay.

MR. SILVERSCHOTZ: Although now that I think about it --

As I said, we really think it's a simple story. Wachovia lent money to Laneco. Laneco supplied Delphi and it was not -- the relationship between Delphi and Laneco seems to have been fraught. Delphi sued Laneco. The parties settled. Laneco got paid and Laneco paid Wachovia and Delphi went into bankruptcy.

Wachovia, as one would expect, as a secured creditor, had liens on Laneco property and those liens were held onto as the Delphi bankruptcy unfolded and two years went by. And in November of 2007, Laneco, as was its right under the agreements between the parties, and I believe under Pennsylvania statute as well, demanded a release of those retained liens because as far as Laneco and Wachovia knew, the statute of limitations had expired.

And Wachovia looked at the Delphi docket for a lawsuit that would have been brought against Laneco or both and the

good news here, Judge, and there's always good news some place in a case like this, is that the sealing mechanism that the clerk's office imposed worked. We looked, the client looked, and the complaint was not visible to us and accordingly, in accordance with its responsibilities, it released its lien a couple of months later, effectively in January of 2008, but clearly the process was unfolding during those last two months.

It's our understanding that the assessed value of the liens released were around two million dollars or so but of course, that's an assessment. That's not necessarily market value and I'm not sure that's going to be an issue but if it is, well that's something the parties can determine.

The history as I mentioned between Delphi and Laneco had several years of unhappiness associated with it. The anger between them apparently persisted such that in December of 2007, the debtors filed their plan exhibit saying that the estate claims against Laneco and Wachovia were going to be retained under the plan, even though as has been noted previously, at the time the plan was a hundred cent plan.

And I am late to the game here, Your Honor. I showed up on June 21 to move my colleague's pro hac admission and I think if it demonstrates anything, one should be careful when one offers to do a favor because here I am arguing the Rule 60 motion. But from reading the debtors' response papers, it seems that at least with respect to everyone other than Laneco

and Wachovia in 2007, December, the Delphi case was a big love fest. They had that full pay plan in the works. The creditors committee was supporting what the debtor was trying to do. And in August of 2007, the debtor was negotiating all sorts of contracts and amendments to contracts and deals with its various suppliers, I suppose in anticipation of the happy day of consummation of that full pay plan.

So, just standing here as a regular kind of bankruptcy lawyer, I can understand why in that environment, the last thing in the world the debtor wanted to do was to bring a bucket of skunks to this garden party that they were having and in the middle of negotiating all those contracts with all those parties, not want to tell them by the way, we've sued you for X million dollars on the Chapter 5.

And I also know that I'm sure every lawyer in this courtroom, and I suspect Your Honor when you were in practice, was involved in either prosecuting or defending a preference case in which there was an omnibus preference case management order where the debtor was in a posture similar to this debtor and they didn't want to spend time and treasure pursuing cases, even if they had to file them to preserve the statute of limitations and the standards order wouldn't seal the complaints but it would say you serve them and the case is stayed. And no answer should be filed. And the case won't proceed unless there's ninety days notice and we're not going

to spend money, we're not going to do anything other than preserve the debtors' rights.

That sort of procedure is standard and we've done it for years and I'm sure it was the process undertaken back when this debtor proposed their original sealing and extension motion in August of 2007.

But what happened here was different and for reasons that I think one can imagine why it would have made sense at the time.

THE COURT: Well, can I go back? When did Wachovia release its liens?

MR. SILVERSCHOTZ: The lien release filing shows January of 2008.

THE COURT: Okay.

MR. SILVERSCHOTZ: The docket review was after the statute of the original -- the two year anniversary of the debtors' filing had passed by I believe several weeks. The debtors' motion to seal and extend time, the first motion, was quite explicit why the debtors were seeking the relief that they sought. They had the negotiations going on and they had a variety of other business relationships that were in various states of advancement and they may not have been suppliers but they were counterparties to other relationships.

The debtor decided to seek a sealing order, rather than file everything in the open and send a letter to everyone

along with the complaint being apologetic and saying we're not going to pursue this, we had to do this because of the statute of limitations.

THE COURT: When did Wachovia see the plan that actually reserved causes of action against Laneco?

MR. SILVERSCHOTZ: I don't know that Wachovia ever saw the plan, Your Honor, and I don't know that Wachovia -- I don't believe that there was a reference to Laneco or Wachovia until such time as the plan exhibit was filed, I'm going to believe, the 28th of December of 2007.

THE COURT: Right.

MR. SILVERSCHOTZ: So even if the plan had been served on Wachovia in some other connection, I don't believe that the reference to Laneco and Delphi was there. Certainly it was not until after the docket review, after the statute had "run", in quotes, but probably that filing was, I think, two weeks -- excuse me, the filing was maybe a week or so after the holiday and the filing was I think on the day or two before the holiday. That is the exhibit filing.

They did review the docket though, as I said, and what's interesting is the manner, at least to me, the manner in which the original, what we refer to as the sealing motion, was described in its caption. And I won't read it into the record. It's clear on the papers what it says. But to the extent that sealing the complaints was a principle form of relief that the

debtors were seeking and to the extent that the presence of that procedures motion could be expected to provide notice to someone, even reviewing the docket, one would, I think expect there to be reference to the fact that complaints had been filed and sealed. And that's not what the motion was called.

So even if someone had searched the word seal or sealing when going through this multi-thousand entry docket in addition to looking for complaints against Laneco or Wachovia, that wouldn't have popped up.

THE COURT: And complaints wouldn't have popped up.

MR. SILVERSCHOTZ: The complaints wouldn't have popped up.

THE COURT: No, no, the word complaint wouldn't have popped up.

MR. SILVERSCHOTZ: I don't know if the word would or would not have popped up but because -- I think that's probably not because the -- frankly, I don't know, Your Honor, if the word complaint would pop up where complaints have been sealed. I don't know if the fact of the filing is there or just the names of the parties sued are what are shielded from search but in any event, the names clearly were sealed and shielded.

What was interesting also and just looking at the original motion in addition to that relief not being in the caption, it's not even in the -- it's not in the introduction, that is to say request for sealing relief isn't in the

introductory description of the relief of the motion. And the prayer for relief on the last page that says please enter the order annexed and of course the order annexed provides for sealing relief. It's not until I think page 20 of the original sealing motion that any reference is made to request for relief in the form of the sealing of the complaints.

Your Honor, I'm old enough to remember when cutting and pasting involved scissors and tape and I've dealt with the most excellent counsel who represent this debtor for the better part of thirty years, and they're among the finest debtors' counsel that we have to offer here in the United States. And Mr. Butler can order a copy of the transcript if he'd like. But one might be forgiven for suspecting that maybe, perhaps, there was a bit of cutting and pasting going on in the preparation of what at the time may have seemed to be a boilerplate motion and I am all for not reinventing wheels and I'm all for keeping administrative expenses down. And I think we can all imagine how upset the United States Trustee's Office, not to mention the creditors committee would be if every basic motion in a complex Chapter 11 such as the Delphi case, was written from scratch.

It is perhaps speculation on my part but I think that someone took a traditional adversary proceeding procedures motion, plugged in some additional relief respecting seeking to seal the complaints and filed it forgetting or perhaps not

being aware that the predicate for the sealing relief did not, in fact, apply to every prospective defendant against which the debtor was anticipating bringing a preference complaint.

It's speculation, Your Honor, but in looking at this set of facts retrospectively, I described it to someone, it's almost like sitting in the backseat of one of those old station wagons where it flips up and you're pointing backwards and you're -- everything's going past you as you go by it, from the opposite direction.

All of this, I think -- I, for one, am not prepared to believe that this debtor intentionally misled anyone and I don't want our papers and I certainly don't want my argument here today to suggest -- first of all, I don't think that's the standard that I would have to achieve in any event, but I don't think that there was an intention here to mislead or to subvert the due process that we believe Wachovia and Wells Fargo were entitled to.

It's not disputed that Wachovia was properly asked by Laneco to release the liens and nor that Wachovia did so after reviewing the docket. Assuming for the sake of argument that the purpose that the debtor stated in their motion was fair and legitimate, it simply didn't apply to Wachovia. And to the extent that under Rule 6, as I think has been correctly stated, the Court has the capacity for cause to modify those requirements. We think it's incontrovertible that as to

Wachovia, no such cause existed and with all due respect to the debtor, we don't think that their response gets them to cause, demonstrates some sort of additional cause that was existing in the case at the time.

We think, Your Honor, that maybe a sealing order makes sense in some cases. Maybe it made sense in this case with respect to the various suppliers and I believe Your Honor said as much previously. But sealing complaints should and I think in the case of Wachovia, have consequences where the factual predicate for the relief that a party seeks in sealing a pleading in retrospect, clearly did not apply.

THE COURT: And that's because the debtor did identify Laneco and Wachovia, so it wasn't -- the rationale of stirring up a hornet's nest didn't apply because they were identified later --

MR. SILVERSCHOTZ: That's correct, Your Honor.

THE COURT: -- or in the exhibit to the disclosure statement.

MR. SILVERSCHOTZ: That's correct, Your Honor. One might suggest that the debtor asked the Court to seal the various complaints because they thought it might give them a negotiating advantage over the parties that may not have been aware that they were potentially going to be sued but again, that didn't apply to us. And we think that parties without notice such as Wachovia which acted to their detriment, who

suffered materially, are entitled to relief on the Rule 60. And with all due respect to the debtors, we think they want to have it both ways here and we don't think that in our case, that should be allowed.

As Your Honor just noted, I think the inference that can be drawn from 7.24, Exhibit 7.24, is that the debtors really never were entitled to any extension relief or sealing relief against Wachovia. We weren't the supplier. We were a target and the debtors knew we were a target and frankly, Your Honor, even in the reply, as far as I can tell, the debtors have never articulated --

THE COURT: But didn't you know you were a target? Didn't Laneco know it was a target?

MR. SILVERSCHOTZ: I certainly don't know what Laneco knew. I know that Wachovia waited until after the statute of limitations expired before releasing its lien, checked the docket and saw nothing there. And to the extent that prudence business practice suggests that where one is paid by a borrower that has a -- that is a supplier to a debtor, that one retain liens pending expiration of a preference statute of limitations, Wachovia undertook a prudent business practice and even went the further step of checking the docket. That's the whole point here, Your Honor.

If the debtors knew that they were going to sue, and in fact had sued, but for whatever reason decided to have that

complaint sealed without cause, that's a risk the debtor took and the burden of the consequences of Wachovia's reasonable actions should be borne by the estate.

THE COURT: What's the status of Laneco today?

MR. SILVERSCHOTZ: Your Honor, I am informed that for all intents and purposes, there is no Laneco. Laneco is either dissolved, a shell, or otherwise unavailable and I don't know if perhaps the debtor can inform us if they've been able to effect service on Laneco or if they have any additional information.

THE COURT: Why didn't Wachovia react as it's now reacted when it got service of the second extension?

MR. SILVERSCHOTZ: It's an interesting question, Your Honor, and we address it in our reply; two observations. And first, Your Honor, speaking for my client, I appreciate the fact that Your Honor as the transcripts indicate, had some sensitivity to the issue of service on non-2002 list Wachovia and I suppose Laneco, as well. The second motion, as I understood it, was never served on us. What was served was the order via notice of settlement and I believe that was the Court's direction, and I believe also and counsel can correct me or perhaps Ms. Kam can correct me, that the order didn't reference -- didn't say anything about sealing complaints in any event, nor did the third or fourth orders which I believe were served.

The debtors' references to Wachovia and Laneco start showing up on page 8 or 9 in a footnote on the second, third and fourth applications. And by the time all those pleadings were served, and I believe they were mailed to Wachovia care of general counsel in Charlotte, and I'm sure Your Honor will appreciate the banks get probably hundreds, if not thousands, of documents every week, Delphi was not a borrower of Wachovia's. Laneco was. There was no correlation, I suppose, between the nature of the motion which appears to, I suppose, one looking at the cover to be a boilerplate procedures motion or an extension motion. And certainly until such time as the complaint was actually served, real effective notice wasn't had by Wachovia and notwithstanding that, the damage was done months earlier when the liens were released.

So those orders correlated to nothing, at least on their face, and one would have to look for the buried reference literally in the footnote, literally towards the backs of the documents.

THE COURT: Well Wachovia wasn't getting any other notices from the debtor; right?

MR. SILVERSCHOTZ: I don't believe so, Your Honor.

THE COURT: So you think this one might have caught someone's eye?

MR. SILVERSCHOTZ: It might have, Your Honor.

THE COURT: Okay.

MR. SILVERSCHOTZ: And for me to stand up here and say no, absolutely, I don't think Your Honor would buy it. But we were talking earlier about spectrum of prejudice, spectrum of notices here, here I think it has to be considered in context; why is this even an issue? And the only reason it's even an issue, and in fairness to Your Honor, the only reason Your Honor is really asking me the question is that the original motion sealed the complaint and it wasn't served in the first place. And the question is whether Wachovia in that context should have been required to figure it out and then come roaring into court on this motion a couple of years earlier.

In that context, Your Honor, the question is well how do we balance the prejudice in light of that? The debtor hasn't proceeded. The debtor doesn't have a complaint out there. Wachovia released its liens back in November of 2007.

THE COURT: January --

MR. SILVERSCHOTZ: Excuse me, January of 2008 after reviewing the docket in November of 2007 and with respect to the cause that the core cause of the prejudice, it was the fact that the predicate for the debtors original sealing motion did not apply to us.

Your Honor, the debtor contends that we're --

THE COURT: Well did --

MR. SILVERSCHOTZ: I'm sorry.

THE COURT: When it was filed, I guess it applied to

Laneco.

MR. SILVERSCHOTZ: I don't think it did, Your Honor, and the reason is at that point it's my understanding that Laneco was no longer a supplier to the debtor. Laneco had no ongoing business relationships with the debtor. They were out of that relationship completely and I suspect, Your Honor, that if Laneco did have an ongoing business relationship with the debtor, they wouldn't have shown up in Exhibit 7.24. Your Honor --

THE COURT: Well, I'll ask them about that.

MR. SILVERSCHOTZ: Okay.

THE COURT: Are you saying that there was no -- even if Wachovia had put two and two together when it got the notice in the third or fourth week of March from the first extension -- the second extension --

MR. SILVERSCHOTZ: Second extension. And then I guess April was the motion of the third.

THE COURT: But just the second extension, it couldn't have gone back and gotten the liens back on again?

MR. SILVERSCHOTZ: I don't think they would have been able to -- I don't think a party has a right to, on a unitary or individual basis --

THE COURT: Did it --

MR. SILVERSCHOTZ: -- to throw that on -- throw a lien on there.

THE COURT: In connection with the lien release, did Wachovia ask Laneco whether it knew of any avoidance action? Did it take any reps or warranties from Laneco?

MR. SILVERSCHOTZ: Your Honor, the demand -- the initial demand, which I believe is an exhibit to the McGovern affidavit, indicates a representation from Laneco and I'll double check that but a representation that no action was commenced and that it was not aware of any action. And frankly, I would have been surprised if they had been aware of anything because they wouldn't have had any better notice. We released the liens, Your Honor, in response to a demand, a timely demand, made subsequent to the expiration of the statute of limitations with no lawsuit having been filed to the knowledge of Laneco or Wachovia.

THE COURT: Okay.

MR. SILVERSCHOTZ: Thank you. Your Honor, that's --

THE COURT: And that's exhibit what?

MR. SILVERSCHOTZ: Exhibit A to the McGovern affidavit.

THE COURT: Oh, I'm sorry, not Exhibit A to the motion?

MR. SILVERSCHOTZ: Not to the motion, Your Honor. We only have the exhibit.

THE COURT: Could you show that to me?

MR. SILVERSCHOTZ: May I approach, Your Honor?

THE COURT: Yes.

MR. SILVERSCHOTZ: It looks like I was overly enthusiastic in my description of the letter, Your Honor, but it references specifically the running of the second anniversary on October 18.

(Pause)

THE COURT: Okay.

MR. SILVERSCHOTZ: Your Honor, the response does something that I suppose I would do if I was in the debtors' shoes which is to try to shoehorn this motion into an 1144 context. In our reply, we I think explain why it's inappropriate because we are fundamentally not attacking any functionality of the plan or the confirmation order or the amended confirmation order.

If the debtor has rights in this lawsuit, if the reorganized debtor has rights in this lawsuit, then great. And the retention -- my understanding of retention provisions in plans is to provide, if you will, a chain of title in the inchoate asset of the cause of action against a particular party. And that derives from a -- we don't have a judicial estoppel contention here, Your Honor. We have a traditional Rule 60 motion.

Your Honor's questions to me, I believe go to the -- excuse me -- go to the issue of timeliness of our motion. We think that under the facts here, our motion is timely. That no

prejudice is befalling the debtor by having this motion heard in this particular timeframe, given the procedural posture of both the case and the adversary proceedings. We've cited cases in which these motions have been heard two, four years after the fact. There are probably cases out there that are even longer.

The key here is whether these facts create a set of circumstances which are legally cognizable to compel the result that the orders sealing the complaint and extending time to serve this debtor -- excuse me, this defendant, should be vacated. We go back to our original contention, Your Honor --

THE COURT: Can I interrupt you? Normally, release of a lien is prejudicial. What was your lien on?

MR. SILVERSCHOTZ: It was on real estate, Your Honor.

THE COURT: And do you --

MR. SILVERSCHOTZ: And I believe other assets. I certainly know that it was on -- that real estate, there's several million dollars or at least two million dollars worth of real estate based on the assessment.

THE COURT: And that's reflected in the letter that you just handed to me where they were about to sell that piece of property.

MR. SILVERSCHOTZ: I believe that is reflected -- the price is not reflected on the property but the Exhibit B which I'll hand up again, Your Honor --

THE COURT: That's okay, I remember it.

MR. SILVERSCHOTZ: Exhibit B is the computer printout from the clerk's office for the property on which liens were released showing the assessed value for two parcels; one for $1.7 million and change and another for $300,000. So we're talking about on an assessed basis, at least two million dollars of value and that's as I said, Exhibit B to the McGovern affidavit.

THE COURT: And that's the property that's referenced in the letter?

MR. SILVERSCHOTZ: Yes, Your Honor.

THE COURT: Okay.

MR. SILVERSCHOTZ: Your Honor, just to wrap it up, there was no cause to seal the complaint against Wachovia. We weren't served with the sealing motion. We released our liens after reviewing the silent docket. None of the motions have captions or reference the fact that complaints have been sealed and the reference to Wachovia and Laneco, we think was consistent buried, confusing and fundamentally post hoc, at least as far as what would have constituted effective and reasonable notice to us. And we think that the debtors really never, probably never intended or were trying to pull a fast one here with respect to us. We hope that wasn't the case but the predicate for the motion simply didn't apply.

And, Your Honor, it's always dangerous for lawyer to

get too caught up in their client's case but I have to tell you, I'd be hard pressed to come up with a set of facts that didn't -- I didn't find as jarring as I do this, in particular here where Wachovia went the extra mile, didn't just rely on the calendar and rely on their service office that handles complaints. They went and looked at the docket and a sealing order is a double-edged sword, Your Honor. I think in this particular case, Your Honor, it cut back against the estate.

Wachovia didn't do anything wrong. Your Honor, we can cite Pepper v. Litton all we want in this court of equity. It's supposed to mean something and I think it does and I know Your Honor thinks it does. In this particular case, equity requires that the orders be revoked pro tanto to the extent they targeted Wachovia. Thank you.

THE COURT: Okay.

MR. SENDEK: Your Honor, Bruce Sendek for the reorganized debtors. I'd like to start by making one point clear. Wachovia is not as innocent as it seems to posture. We use in our response the word hostage payment and it is apropos. It was a 1.86 million dollar payment made within approximately sixty days or less of the Chapter 11 filing. What led to that payment made directly to Wachovia is rather interesting and we know it well. My partner here, Tom Radom, was involved in working out that settlement with Wachovia. Laneco was the supplier, a very strategic supplier at the time for Delphi and

Delphi needed the shipments.

Wachovia, who had a lock on Laneco, wasn't going to let that happen unless it got its part of the tribute and that tribute was 1.86 million dollars that was paid directly by Delphi to the bank.

So you start off with Wachovia knowing that it is definitely within the sights of a preference action it received of 1.86 million dollars within the time period and it knows the circumstance under which it received that money. And I believe in the settlement agreement, there's even language to the effect that nothing that happens in bankruptcy is going to undo that. Well, of course, that's not enforceable. So that's how we start off.

And some of the points that the bank makes don't make much sense. They claim that before they released the lien in January of 2008, they were diligent. It's hard to imagine, they say they searched the docket and had no inkling that they were a potential defendant or that this process was taking place. The order itself counsel didn't want to belabor the record but certainly anyone searching the docket to see if there's the need for further inquiry or that if some adverse action is being taken against the bank would have reason for further inquiry when they saw that this court entered an order, and I won't read the whole thing, but tolling statute of limitations with respect to certain claims, subsection two,

authorizing procedures to identify causes of action that should be preserved and three, establishing procedures for certain adversary proceedings including those commenced by the debtor under the -- and it identifies the particular statute in question. So --

THE COURT: I'm sorry, what's the date of that order? That's the --

MR. SENDEK: This was the first order entered --

THE COURT: That's the --

MR. SENDEK: -- the first preservation order.

THE COURT: That's the September 2007?

MR. SENDEK: Yes, Your Honor.

THE COURT: Okay.

MR. SENDEK: It was. And if the bank was really being so cautious, as well and waiting until the two year anniversary passed, they would also know that a summons that would have been issued would not necessarily be served on day one following the anniversary date.

THE COURT: No, I think they acknowledge that but their point is that there was no complaint on the docket.

MR. SENDEK: Well --

THE COURT: No filing.

MR. SENDEK: And their other point is that they think that that order was entered for the very limited purposes of not disturbing the suppliers. That they were --

THE COURT: But that's a separate issue. That's the issue about the rationale of the motion not applying to them but that doesn't really go to the notice issue.

MR. SENDEK: Well, it does go to this sense -- in this sense, Your Honor. They're seeking to attack that order under Rule 60(b)(4) declaring that the order was void and that can only be done under extreme showing of exceptional circumstances and they go that route because they've waited so long to attack this particular order.

THE COURT: But you're right. This isn't a Rule 60 attack.

MR. SENDEK: That's how they framed their motion, Your Honor.

THE COURT: Well, I understand.

MR. SENDEK: And our position is that it should have been foreclosed by --

THE COURT: Why can't they attack it simply as asking me to reconsider my interlocutory order now that notice is properly out there?

MR. SENDEK: Because the plan confirmation order precludes that under -- their attack had to be under 1144 within, I think it's 180 day period. They didn't. They didn't do that and they admit that in their reply brief that a motion under --

THE COURT: And how does the plan confirmation order

operate here to preclude my applying Rule -- looking at the 4(m) all over again?

MR. SENDEK: It authorizes the reorganized debtor to bring the adversary proceedings including this one. And now what they're doing is going prior -- going back prior to that particular order, the confirmation order, and looking at an order that predated it substantially and trying to attack that. I think the Supreme Court decision of Espinosa is instructive on this. That's the case where there was a challenge by a creditor to -- it was a Chapter 13 proceeding, who claimed that the --

THE COURT: But the difference is that the Espinosa ruling was a ruling on the merits that the government could be crammed-down, notwithstanding the Bankruptcy Code. Here it just preserves the cases subject to everything; right?

MR. SENDEK: Well, Espinosa I think goes farther than that. It says that the creditor should have attacked much sooner if they were going to complain about the process and the procedure.

THE COURT: But how was the ruling res judicata? How is that order res judicata on this point, on the 4(m) point?

MR. SENDEK: Because the Court found that as part of the plan, the reorganized debtors had a right to bring these actions. They're part of the plan. They are -- and this is a collateral attack on the plan and, of course, one of the cases

we cited of In Re: Bencorp, that's a Delaware case, says that an indirect attack like this on the plan is not permitted. And that's what this is. And, of course, they did have notice, Your Honor and yet they waited over three years to bring this motion.

THE COURT: But they say it doesn't matter. They already released the lien.

MR. SENDEK: Well, they say that. That's correct. They say that but to have -- but still to have waited three and a half years to have tried to undo that?

THE COURT: How are the debtors hurt by that?

MR. SENDEK: The debtors are hurt by that because it's now three and a half years and if there was an opportunity for the bank to reinstate its position, we don't know that --

THE COURT: But how would Laneco have given them the collateral back?

MR. SENDEK: How would we have given the collateral back?

THE COURT: How would Laneco have given them the lien back? It seems pretty far-fetched to me.

MR. SENDEK: Well, I don't know how the bank could -- I don't know how the debtor could give --

THE COURT: No, how would -- they released the lien --

MR. SENDEK: Right.

THE COURT: -- on two assets that were going to be

sold imminently.

MR. SENDEK: Right. Correct.

THE COURT: How can they get their lien back?

MR. SENDEK: Well, I don't know that standing here today, Your Honor. And maybe --

THE COURT: But is there any conceivable way they would have?

MR. SENDEK: Well, there's a letter that I saw, had a representation made by Laneco of no known --

THE COURT: No lawsuits had been brought.

MR. SENDEK: No lawsuits were brought.

THE COURT: You don't assert that Laneco had knowledge of it, do you?

MR. SENDEK: I'm sorry, Your Honor.

THE COURT: Do you say that Laneco had knowledge of the lawsuit?

MR. SENDEK: I'm not making that statement, Your Honor.

THE COURT: So --

MR. SENDEK: But --

THE COURT: I mean that's why I asked them about this. I mean if Laneco had misrepresented a fact to them, then they probably could have gotten the lien back but I don't see -- given that it doesn't appear that they did, Laneco could say look, you know, you released the lien. I'm not going to give

it back to you.

MR. SENDEK: I think the better question is, Your Honor, why did the bank wait this long to bring this action when it had notice, it had specific -- at the first extension, at the first extension that -- I mean Wachovia was a subject of discussion with the Court.

THE COURT: Right.

MR. SENDEK: And the Court directed the debtors' counsel to give notice of presentment of the order and they did. And then from that point on, there was no objection and there --

THE COURT: What should I take away from that though?

MR. SENDEK: Well I would quote counsel for Wells Fargo who appeared earlier today when asked, when the Court said that look, there was no objections filed by any of the recipients of notice to any of the extension orders and I think the Court said what should I take away from that and the answer was, then they shouldn't object now. I think that's what the Court should take away from it. They shouldn't object now. Wells Fargo counsel says so and it's far too late now at this point.

THE COURT: Why? If you haven't been prejudiced, why is it too late?

MR. SENDEK: Well again, we don't know all of the circumstances and facts that dealt with particular release of

this lien. We know what the affidavit says but we don't know more than what's on the face of that affidavit. Of course we haven't had an opportunity to do any discovery on that. So that is, of course, one issue out there.

And second, the debtor -- the reorganized debtor entered into a plan of reorganization expecting funding from a number of sources, one of them which is this particular action which was part of the adversary proceedings which we're going to fund the reorganized debtor. And it understood and believed and is part of the plan approved by the Court, that it would have the right to bring these adversary proceedings. Now that is prejudice in my mind because that turned out, according to the bank --

THE COURT: But they're not --

MR. SENDEK: -- not to be accurate.

THE COURT: Okay. And you say that since they were on the exhibit, they should know that.

MR. SENDEK: Since they were on the exhibit, since they received notice of the confirmation hearing, sure, they should have known that. And they should have determined that if they had a right to, if they wanted to object, that was their time. Otherwise, they would be foreclosed in the future.

THE COURT: Of course, the last order was entered after a plan confirmation.

MR. SENDEK: That's correct but they're not attacking

the fourth -- the final extension order. That's -- by what --

THE COURT: Why aren't they? I mean, they are, aren't they?

MR. SENDEK: No, they're not. The Court gave the parties the opportunity to challenge notice of the fourth extension order back in June.

THE COURT: Separately.

MS. HAFFEY: The June date.

MR. SENDEK: Wachovia did not submit an affidavit on that. So they have filed this separate motion under 60(b)(4) because it's the only avenue that they can come up with to challenge it at this late date. And the only way they can come up with an avenue to -- because they know they got notice of the final extension, the second extension, the first extension. They know that. They have one procedural angle that they're playing and that is to use 60(b)(4), which should only be, which should only be allowed to undo an order under exceptional circumstances, exceptional circumstances, and they've not shown that the order is void. They're claiming that the order is void. That's the other point, too, Your Honor. It's not just a question of waiving preference -- I'm sorry -- prejudice, which I think is premature on this record. It's not just that. To get where they want to go, the Court needs to make a finding that that order that it entered was void and how does it void? We go -- it was entered appropriately. It was a 4(m) order

entered by this Court, okay, ex parte, under seal, all appropriate using the avenue of 4(m) and 9006 and the Court determined that there was good cause for its entry.

Now, they tried to say well hey there wasn't. It's a void order. Why? Because -- and their only rationale is because that order, that order they say, was only entered because Delphi didn't want to upset its suppliers. Well, of course, there was far more to it than that. And even if that -- at that point, there was an understanding, a belief, a hope that there would be full funding and that if the adversary proceedings would not take place. There was more to it than that.

But the fact that one of the reasons, one of the grounds arguably didn't apply to them because they say there was no need not to upset up, arguably, we don't know what other relationships there were --

THE COURT: Let me interrupt you. This is the argument I think they're making, that the confirmation order doesn't come into this because the Rule 4(m) order was entered into before confirmation of the plan and they released their lien before confirmation of the plan and so, therefore, the damage was done at that point.

MR. SENDEK: That is their argument but it doesn't work because it all hinges on what? On the order that this Court entered into September 2007 being void. If it's not

void, their argument fails right there.

THE COURT: Well, let me -- Mr. Silverschotz, is this just a Rule 60 motion?

MR. SILVERSCHOTZ: It's filed under 60(b)(4) and 60(b)(6), Your Honor.

THE COURT: All right. So as a Rule 60 motion, I don't think it works. I mean it may work as a motion to get me to reconsider the entry of my order as I've been talking about with other defendants but I don't think it works as a Rule 60 motion.

MR. SILVERSCHOTZ: Your Honor, in our prayer for relief, we asked for such further and other relief as appropriate and the factual predicates are as they are and to the extent that Your Honor can give us effective relief by simply reconsidering the orders, rather than revoking them, that would be acceptable to Wachovia.

THE COURT: All right. I'd rather do that in the context of what we're setting up with everyone else. I don't think it works as a Rule 60 motion. It's an interlocutory order and there's been a lot of time that has passed since then. Arguably, you all should have known about this in March of 2008. You could have made the motion then. So I think it's more appropriate to deal with in the context of the other thirty-five objectors.

MR. SILVERSCHOTZ: Thirty-six or thirty-seven.

THE COURT: And I think that frankly, the debtor is entitled to probe the affidavit as to checking the docket and knowledge, and also what discussions, if any, there were with Laneco.

MR. SILVERSCHOTZ: So going back to the point I made earlier this morning, Your Honor, when my question was --

THE COURT: Yes.

MR. SILVERSCHOTZ: -- whether the issues that we raised in this motion with respect to individualized prejudice, the Court would rather --

THE COURT: Right.

MR. SILVERSCHOTZ: -- consider in the context of the Rule 15 application --

THE COURT: Yes.

MR. SILVERSCHOTZ: -- having heard the parties --

THE COURT: Having heard enough, I think it should be.

MR. SILVERSCHOTZ: Okay.

THE COURT: I agree with you that releasing a lien is a textbook example of prejudice and if, in fact, your clients checked the docket and legitimately didn't focus on the disclosure statement, they may well win on that but it's not in the context of a Rule 60 motion and plus which I think that that issue needs to be developed some.

MR. SILVERSCHOTZ: That's fine, Your Honor. As I am sure all the other defendants will do, I'm happy to work with

counsel on an appropriate discovery schedule. We brought this motion, Your Honor, the way we did --

THE COURT: I don't fault you for that.

MR. SILVERSCHOTZ: Thank you, Your Honor. The context was somewhat bizarre and we just thought it was a good way to present it to Your Honor. And at some other point, Your Honor and I perhaps we can discuss whether or not there really is a final order or it is an interlocutory order which I think is -- it's an interesting issue but for now we'll proceed as Your Honor has directed us.

THE COURT: Okay. I mean I think ultimately you are better off with it being an interlocutory order.

MR. SILVERSCHOTZ: I think so too, Your Honor. I think so too. Your Honor, do you want us to work an order back and forth? Is it denied with prejudice?

THE COURT: It's denied as to the Rule 60 point. It's without prejudice to request to have me reconsider the -- under Rule 6, the 4(m) order.

MR. SILVERSCHOTZ: That's fine. We'll do that, Your Honor, and thank you very much for your time.

THE COURT: Okay. Thank you.

MR. SENDEK: Thank you, Judge.

THE COURT: Okay. Thanks.

(Whereupon these proceedings were concluded at 1:25 PM)

I N D E X

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C E R T I F I C A T I O N

I, Dena Page, certify that the foregoing transcript is a true and accurate record of the proceedings.

Dena Page

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